SUPREME COURT, U. S.

NOV 21 1967

JOHN F. DAVIS, CLERK

APPENDIX VOL. I.

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF JOHN RUFFALO, JR.,

Petitioner.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

Petition for Certiorari Filed March 24, 1967.

Certiorari Granted October 9, 1967.

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THE RELEVANT DOCKET ENTRY.

DECREE OF THE CIRCUIT COURT OF APPEALS.

(December 29, 1966.)

This cause is before the court upon its order to the respondent, John Ruffalo, Jr., to show cause why his name should not be stricken from the roll of counsel of this court, and upon the said respondent's response to said order and upon due consideration thereof, and for reasons set forth in the opinion of this court filed contemporaneously herewith,

IT IS ORDERED that the name of John Ruffalo, Jr., be, and it is, hereby stricken from the roll of counsel permitted to practice before this court. This discipline shall remain in force until the further order of this court.

Entered by order of the court.

/s/ CARL W. REUSS, *Clerk*.

APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

MAHONING COUNTY BAR ASSOCIATION *v.* RUFFALO.

Attorneys at law—Misconduct—Disciplinary action—Suspension—Acts warranting.

(D. D. No. 57—Decided May 20, 1964.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The facts are stated in the opinion.

PER CURIAM. This proceeding was set in motion in 1962 when the Mahoning County Bar Association filed its written complaint with the Board of Commissioners on Grievances and Discipline, charging John Ruffalo, Jr., an attorney at law of the city of Youngstown admitted to the Bar of Ohio in 1946, with unprofessional and unethical conduct in violation of the Canons of Professional Ethics.

The complaint, consisting of 14 charges, was referred to a three-member hearing panel for the taking of evidence and for report. Upon hearing, the panel concluded that charges numbered 3, 8, 9, 10, 11, 12 and 13 had been proved, and that respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the panel and the record, the board recommended that respondent be disbarred.

As stated in paragraph five of the syllabus in *In re Lieberman* (1955), 163 Ohio St., 35, 125 N. E. (2d), 328, "the degree of proof required in a disbarment proceeding is a preponderance of the evidence." To the same effect see the *per curiam* opinion in *Cleveland Bar Association v. Fleck* (1961), 172 Ohio St., 467, 469, 178 N. E. (2d), 782.

In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes rec-

ommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts.

As to charge No. 8, it is stated in respondent's brief:

"The facts * * * which are alleged in this charge are that respondent 'did advance monies to certain clients * * * while their claims were pending, which advances were deducted from any settlements * * * later received in settlement of said claims.' Those facts do not * * * constitute misconduct * * *.

"* * *

"The record shows that respondent did advance monies to certain clients, but with the understanding that such monies were to be repaid irrespective of the outcome of the pending litigation. * * *

"A loan is not a purchase. So long as there is an agreement that the money is a debt and is to be repaid irrespective of the outcome of the case, it is nonsense to claim that the loan or advance amounts to the *purchase* of an interest in the litigation. Indeed, a contingent fee contract with an assignment to the lawyer (the recovery of which is wholly dependent upon the outcome) comes much closer to the prohibition in this canon [No. 10] than the simple loan or advancement of money. Yet such a fee contract is perfectly valid in the state of Ohio and has been upheld by the courts of Ohio in litigation involving lawyers' claims based upon such contracts. *Roberts v. Montgomery,* 115 Ohio St., 502, *Scheinesohn v. Lemonek,* 84 Ohio St., 424, and *Cleveland Ry. Co. v. Godfrey,* 28 O. L. R., 466 * * *." But cf. Canon 13.

Canon 10 provides:

"The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 reads:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement."

It is clear that the word "expenses" appearing after the semicolon refers to "expenses of litigation." It would not include advances of the kind admittedly made by respondent for "living expenses * * * during the period between the filing of and the trial or disposal of the case." See opinion No. 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A. Journal, 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association, v. McCallum* (1930), 341 Ill., 578, 173 N. E., 827, on this question with Canons 10 and 42.

It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons contemplate that this will be proper only where the advance is for "expenses of litigation."

It may be observed that the cases of *Roberts v. Montgomery, supra* (115 Ohio St., 502), *Scheinesohn v. Lemonek, supra* (84 Ohio St., 424), *Cleveland Ry. Co. v. Godfrey, supra* (28 O. L. R., 466), and *Reece v. Kyle* (1892), 49 Ohio St., 475, were all decided before this court adopted by rule the Canons of Professional Ethics. In view of the adoption of those canons, those cases would

no longer be applicable to the extent that they are inconsistent with provisions of the canons.

As to charge No. 13, the report of the board summarizes the evidence and facts as follows:

> "It is charged that the respondent conspired with * * * Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.
>
> "The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962, on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the respondent, Orlando was paid $25 a day plus expenses and investigated all of the respondent's railroad cases. He said that he worked an average of ten or fifteen days a month for the respondent. Withholding slips, internal revenue form 1099, were received in evidence * * * and showed the following amounts paid to Orlando by the respondent:
>
> "1957 — $2,950.00
> "1958 — 1,250.00
> "1959 — 1,237.37
> "1960 — 3,829.25
> "1961 — 4,716.00
>
> "According to Orlando, respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his income tax returns were filed * * *. Respondent stated:
>
> " 'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly

what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.'

"Later respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

"'* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike—'* * *.

"The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961 and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *.

"Although the full extent of Orlando's activities in behalf of the respondent could perhaps be better determined if respondent had submitted his records for examination as requested by the chairman of the panel, there is no dispute about the fact that the respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando

was working for that railroad * * *. Furthermore, the respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the respondent. The panel questioned the respondent at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages in having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *.'"

With respect to this summarization, respondent's brief in this court states:

"As stated by the board, there is no dispute in the evidence with respect to the foregoing charge. The board does indulge in some innuendoes, but the facts relevant to this charge are, simply stated, these: Respondent did hire Michael Orlando to investigate lawsuits for him, and some of those lawsuits involved claims against the Baltimore & Ohio Railroad Company. During this time * * * Orlando was an employee of the Baltimore & Ohio Railroad Company, but engaged in train service, that is, the service of a working railroad brakeman. While we do not consider it material, respondent did frankly testify that he kept no entries of payments to Orlando and that payments were made in cash."

Respondent contends that his employment of Orlando to work against the interests of Orlando's employer, B. & O., was proper by reason of the provisions of Section 60, Title 45, U. S. Code, which reads in part:

> "Any contract, rule, regulation, or device whatsoever * * * to prevent employees of any common carrier from furnishing *voluntarily* information * * * as to the facts incident to the injury or death of any employee, shall be void, and whoever * * * shall attempt to prevent any person from furnishing *voluntarily* such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing *voluntarily* such information to a person in interest, shall, upon conviction * * * be punished * * *." (Emphasis added.)

Obviously this statute would have no application to the instant case. Orlando did not "voluntarily" furnish information. He was paid by defendant to get information.

Respondent's employment of Orlando to work against the interests of his employer, B. & O., so as to benefit respondent and his clients was not an isolated instance. What records respondent was able to produce indicated substantial payments to Orlando in each of five years.

The payment of $4,716 in 1961 was all for work done prior to July 19 of that year.

Respondent now argues that there was nothing wrong with respondent's paying Orlando substantial sums of money to work against the interests of his employer, B. & O., so as to benefit respondent and his clients.

If the respondent did not know that it was wrong to do this, why did he try to cover it up? His testimony that he did this to protect Orlando from charges being made by B. & O. is not convincing testimony that he did not know that this employment of Orlando was wrong.

Why did respondent not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their

income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B. & O. charged Orlando with soliciting cases against it for Ruffalo. In September 1962, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B. & O. and against Ruffalo in the proceedings brought against him.

In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar. He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so.

This is not the first time that respondent's conduct as a member of the bar has been questioned and found improper. After he was found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people" and was disciplined therefor in 1957, he showed a contempt for the court, which made that finding and provided a very

lenient discipline for his misconduct. Although he admittedly was well able to pay costs amounting to several hundreds of dollars and had been ordered by that court to "pay the costs of this proceeding within 30 days," he neglected to make any effort to pay them until shortly before the first hearings in these proceedings more than five years later.

The members of this court are not in agreement as to whether the facts are as the board of commissioners recommended they should be found with respect to some of the other charges against respondent. However, in view of the admitted facts with regard to charges 8 and 13 and the previous judgment of 1957 and the attitude of respondent with respect thereto, we are of the opinion that respondent should be suspended for an indefinite period from the practice of law.

JUDGMENT ACCORDINGLY.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL and KERNS, JJ., concur.

GIBSON, J., concurs in the judgment.

HERBERT, J., dissents.

KERNS, J., of the Second Appellate District, sitting by designation in the place and stead of GRIFFITH, J.

GIBSON, J., concurring. In view of the respondent's right to apply for reinstatement after the passage of two years following the order of suspension, I concur in the judgment of the court. Paragraph 21, Rule XXVII of this court. Because of the nature of the issues decided in the instant case, I believe it desirable to comment briefly upon them.

Since it is evident that basically the court and the board of commissioners treat this as a case of solicitation, the following comments may not be inappropriate.

Although the solicitation of law business does not import venality, criminality, fraudulent practices or moral turpitude, it is inimical to the good reputation of the bar. Solicitation within the meaning of Canon 27 can not be precisely defined in such a way as to apply in every case.

Courts surely are not expected to be ignorant of things that other men well know. Everyone knows that attorneys, for their practice, depend upon friends, clients and former clients, and their activities within the community. Friends, acquaintances, and associates of an attorney have the unquestioned right to praise his legal abilities and to divert to him such clients as they can persuade in a legitimate way to engage his services.

This respondent has pursued the personal injury practice of law successfully and aggressively. We would be naive to say that his enterprise has not occasionally carried him into areas where his activity is subject to criticism. In fact, the record clearly shows that in 1957 he was reprimanded by the Common Pleas Court for unprofessional conduct in soliciting professional employment by and through authorized agents and employees.

Charges No. 8 and No. 9 relate to instances where respondent advanced money to certain clients. Respondent admits that such advances were made but justifies them on the ground that they were made as acts of kindness at a time when these clients were in necessitous circumstances.

Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics. Canon 42 expressly recognizes that a lawyer may in good faith advance expenses of litigation as a matter of convenience but subject to reimbursement. Perhaps an occasional advance or loan by a lawyer to his

client is not proscribed. At best it is a practice which should be followed infrequently and used with extreme caution because it has long been questioned by the courts and the organized bar. It may well be that the advances made by respondent were of such amounts and frequency, and without a sufficiently clear obligation on the part of the clients to reimburse respondent regardless of recovery, that the finding that respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 is proper.

In charge No. 13, the respondent is accused of conspiring with Michael Orlando and paying Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer. The evidence shows that Orlando worked for the railroad from 11:00 p.m. to 7:00 a.m., five days a week, and that the daytime was his own without restriction. There is nothing unethical in the employment of an investigator. It can not be inferred from such employment that the attorney is "ambulance chasing." In fact the board did not find that Orlando had been soliciting claims for respondent. It found instead that respondent was guilty of misconduct because he was a party to a transaction which caused Orlando to breach his duty of loyalty to his employer.

The principle that "an agent can not serve two masters" is well established. Certainly an attorney may not ordinarily represent principals with conflicting interests, *e.g.*, vendor and vendee of property. But here the respondent was a principal or master and not the agent or servant. It would appear that the penalty, if any, for a transgression of the principal should be borne by the agent, Orlando. I fail to find any provision in Canon 29 or Canon 32 which would require that a sanction be applied against the respondent, who merely made it possible for Orlando to attempt to serve "possible" conflicting interests.

HERBERT, J., dissenting. I am unable to join in the judgment entered in this cause, basically, for two reasons: (1) the judgment in substance overrules long recognized and established principles of law in Ohio, to wit, *Roberts v. Montgomery*, 115 Ohio St., 502; *Scheinesohn v. Lemonek*, 84 Ohio St., 424; *Cleveland Ry. Co. v. Godfrey*, 28 O. L. R., 466; and *Reece v. Kyle*, 49 Ohio St., 475; and (2) a recent decision of the Supreme Court of the United States, being *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar* (April 20, 1964), 84 S. Ct., 1113.

The *per curiam* overrules *Reece v. Kyle*, 49 Ohio St., 475. In that case, Spear, C. J., delivered a scholarly opinion of a unanimous court upon the obstacles that have confronted courts for hundreds of years in Anglo-Saxon judicial history. He pointed out the efforts to throttle the vicious practices of champerty and maintenance but also emphasized the ever-present duty of the courts to protect the weak and dependent from oppression by the powerful. While commenting upon rules necessary to control evils of the past, he warned, in the opinion, at page 487:

> "* * * new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts."

In the case at bar, respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.

For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the dependents,

through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hungry.

People, ex rel. Chicago Bar Association, v. McCallum, 341 Ill., 578, 173 N. E., 827, is a case squarely in point.

There, the facts recited in the opinion are amazing. It is well worth reading. The second paragraph of the syllabus states the law of the case in this language:

> *"Advancing money to indigent client is not against public policy.* The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of a personal injury case and while he is unable to earn anything, may, in a sense, tend to foment litigation by preventing *an unjust settlement from necessity,* but there is no authority holding that it is against public policy and no reason why it should be so considered, *as a man in indigent circumstances thereby may obtain justice where without such aid he would be unable to do so."* (Emphasis added.)

Under the holding in the case at bar, the doctrine of the *McCallum* case cannot be followed in Ohio.

Charge 13 and the facts in support thereof are quite simple. One Orlando was a yard employee of the Baltimore

& Ohio Railroad. He released the "air" of incoming trains. He had a regular tour of duty. He performed his duties faithfully and well. He was loyal to his employer in his employment. Respondent employed Orlando during some of his off-duty hours and on his own time to interview witnesses and discover the facts and circumstances surrounding episodes wherein clients of the respondent were injured while in the performance of their railroad duties or were killed by reason of the negligence of the employing railroad.

To establish negligence of a railroad causing such an injury or death, witnesses, who thoroughly understand the intricate and complex construction and operation of railroad mechanical devices and equipment, are essential. Such information and such witnesses are necessary to establish a case, for an injured workman or for the dependents of one killed, by testimony by those familiar with railroading and the operation of trains.

Orlando's employment was not in violation of law. It was thoroughly consistent with enactments of Congress, particularly Section 60, Title 45, U. S. Code, referred to in the *per curiam* opinion. This law intended to make available information to injured employees and persons in interest. Without the aid of Orlando or some other well-informed person, the respondent would not have the names of necessary witnesses and would be handicapped severely in the presentation of a case of an injured railroad workman or the dependents of one killed by reason of the railroad's negligence. By his extra work, Orlando helped the injured and the dependents of the dead to secure justice. The *per curiam* says that Orlando was disloyal to his railroad employer, and the respondent was unworthy of being a lawyer because he used witnesses and information secured by Orlando. The respondent was acting under a law

enacted by the United States Congress above mentioned and in furtherance of the administration of justice.

Respondent furnished records to the Internal Revenue Service to show his payments to Orlando in order to deduct the same from his own income tax. It seems to me that records that satisfy the Internal Revenue Service were all that respondent was required to keep. It is said that Orlando was disloyal to his railroad employer by furnishing information and evidence that would compel his employer to respond to the requirements of justice. Orlando was acting in pursuance to and in accordance with a congressional enactment. He was at the same time giving an invaluable service to injured railroad workmen and the dependents of the dead who were represented by the respondent.

> "A state could not, by invoking the power to regulate the professional conduct of attorneys, *infringe in any way* the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." (Emphasis added.) *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar, supra.*

Charge number 13 against the respondent, and the facts offered to substantiate it, appear to me to be clearly contrary to the above-quoted principle of law.

APPENDIX B.

FIRST MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT.

BATTISTI, *J.*:

On May 20, 1964, the Supreme Court of Ohio ordered that Respondent John Ruffalo, Jr., be indefinitely suspended from the practice of law in Ohio. *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263, 199 N. E. 2d 396 (1964). This order became final and effective when, on December 7, 1964, the Supreme Court of the United States denied Respondent's petition for certiorari. *Ruffalo v. Mahoning County Bar Association,* 379 U. S. 931 (1964).

Rule 1(E) of this Court's rules provides in part as follows:

> "E. Disbarment and Discipline. Any member of the Bar of this court may for good cause shown and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper.
>
> "Whenever it is made to appear to the Court that any member of its Bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court, and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within ten days, there shall be entered an order of disbarment, or of suspension, for such time as the Court shall fix.
>
> "* * *"

Pursuant to Rule 1(E) it was ordered on January 26, 1965, that Respondent suspend his practice in this Court. It was further ordered that Respondent show cause with-

in 30 days why he should not be disbarred from practice in this Court.

On February 25, 1965, Respondent filed his response to the Order to Show Cause. Shortly thereafter, the Court requested that the trustees of the Mahoning County Bar Association appear before the Court to discuss the matter of the disbarment proceedings. Since the Mahoning County Bar Association had aggressively prosecuted the State disbarment proceedings and was obviously the body most familiar with the facts of the case, it was the Court's feeling that said association should represent the interests of the Bar in these proceedings. A substantial number of the trustees of the Mahoning County Bar Association appeared in response to the Court's request for a meeting. At the meeting doubt was expressed as to whether the Mahoning County Bar Association wished to continue its participation in the matter. Rather, it was suggested that the Mahoning Bar would like to inquire whether the Ohio State Bar Association would appear in the proceedings in this Court.*

By order of the Court, a pretrial conference was set for March 26, 1965, to consider questions concerning procedure, stipulations, a hearing date, and any other matters which might be brought to the attention of the Court. The Mahoning County Bar Association was represented at this pretrial conference by Attorneys Joseph Bryan, James Bennett, Jr., and Paul Smith. The Clerk's minutes of the pretrial hearing show that the Mahoning County Bar Association orally moved to appear *amicus curiae* in these proceedings and that said motion was granted by the Court. The Clerk's minutes further show that the

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* On motion by the Respondent, the Court, on March 10, 1965, modified the Order of January 26, 1965, to allow the Respondent to engage in the office practice of law during the pendency of these proceedings.

following schedule was set for the disposition of these proceedings:

(1) Counsel for the Respondent to file a proposed stipulation of facts by April 2, 1965.

(2) The Mahoning County Bar Association to file a statement of its views with regard to the proposed stipulation of facts by April 9, 1965.

(3) The Mahoning County Bar Association to file a brief in opposition to Respondent's response to the Order to Show Cause by April 16, 1965.

(4) A hearing was set for April 26, 1965.

The Court was informed at this time that Attorney Joseph Bryan would be representing the Bar Association.

On April 3, 1965, Respondent filed his proposed stipulation of facts. On April 9, 1965, the Mahoning County Bar Association filed its objections to Respondent's proposed stipulation. On April 16, 1965, the Mahoning County Bar Association filed its brief in opposition to the Respondent's response to the Order to Show Cause.

Several days prior to April 26, 1965, the Court requested that the parties be contacted to confirm the oral hearing set for April 26. The Court learned in this manner that Attorney Joseph Bryan had withdrawn from the case. Thereafter, upon further inquiry, the Court learned through Attorney Oscar Kaufman, President of the Mahoning County Bar Association, that the Bar Association would appear at the hearing on April 26, 1965, but that it did not wish to offer any arguments.

On April 26, 1965, Attorney Craig Spangenberg appeared before the Court representing the Respondent. Attorneys Oscar Kaufman, Bernard Wilkes, and Charles P. Henderson appeared on behalf of the Mahoning County Bar Association. At the conclusion of Mr. Spangenberg's

arguments, the following colloquy took place between the Court and the representatives of the Bar Association:

> "Court: Does the Mahoning County Bar, through its President, Mr. Kaufman, wish to argue?
>
> Mr. Kaufman: As President of the Mahoning County Bar Association, I have been directed by its trustees to say to the Court, in substance, that the Mahoning County Bar Association will waive arguments at this time, and will submit this cause to His Honor based upon the briefs filed in the record.
>
> Court: Now, after this record is typed, I would like an opportunity to review it, together with the briefs that have been filed thus far, for some questions that I wish to be argued before me; and at that time, if I do, the representatives of the Mahoning County Bar Association who have appeared, will be ordered to argue those questions. There are some very serious matters here, which I think need a thorough adverse argument. * * *
>
> Mr. Wilkes: If the Court please, I think it should be made clear that no one of the Mahoning County Bar Association has read the record of the proceedings before the Ohio Supreme Court. We are not at all familiar with the contents of that record.
>
> Court: All right, you have made it clear on the record. I think it should be made clear on the record that the Mahoning County Bar Association has had time to read it, but perhaps not you—those sitting here at the counsel table. There was counsel who represented the Mahoning County Bar Association in this matter before this court, and in the case against Mr. Ruffalo before the trial board, and before the Supreme Court of Ohio and the Supreme Court of the United States, but he is not present here. He was on vacation at the time of the first conference. I think he has since returned.
>
> Mr. Kaufman: I regret I am not able to help to analyze that situation.

Court: I cast no doubt against that particular attorney. I just want the record to show that he is not here and has not carried forward this argument.

I will begin immediately to work on this case, and the reporter will get it to me as quickly as possible.

I do want you to be prepared for additional argument before the matter is completed in this court."

It is readily apparent from the above-quoted comments that the Court was, at the time of the hearing, less than satisfied with the conduct of the Mahoning County Bar in these proceedings. Further, the Court was of the opinion that the Mahoning County Bar Association, acting through its trustees, had failed to responsibly execute its duty to the Court and the Bar. Thus, notwithstanding the fact that the Mahoning County Bar Association aggressively prosecuted the State disbarment proceedings, at no time in these proceedings* had any member appeared on behalf of the Association who appeared to have more than a fleeting knowledge of the facts of the case. Under the circumstances of this case, as will be discussed in greater detail subsequently, the aid of the members of the Bar Association who had knowledge of the facts of the case would have been of invaluable assistance to the Court in the disposition of these proceedings.

Notwithstanding the Bar Association's clearly demonstrated apathy towards these proceedings, a motion was filed in this Court on June 9, 1965, requesting an *en banc* hearing. On June 24, 1965, the Court heard oral arguments on this motion. At the conclusion of these arguments the Court denied the request for an *en banc* hearing.

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* Except for an appearance on the motion for hearing *en banc* which was filed after hearing on the merits.

At the oral hearing on June 24, 1965, the Court granted the Bar Association and the Respondent leave to file further briefs on the issues presented with regard to Charge No. 13. The Bar Association filed its supplemental brief on July 6, 1965, and the Respondent a reply thereto on July 12, 1965.

From a reading of the entire record of the State disbarment proceedings, particularly the testimony of one Charles S. White, an employee of the Association of American Railroads, it seems clear that the genesis of the disbarment proceedings against Respondent was an investigation conducted by agents of the Association of American Railroads. (Tr. 770 to 773.) After the investigation of said Association had been completed, the results were turned over to Attorney Jay Brownlee, then President of the Mahoning County Bar Association.* Some time in 1962, charges were filed against the Respondent by the grievance committee of the Mahoning County Bar Association. These charges involved Respondent's relationship with certain persons contacted and interviewed by representatives of the Association of American Railroads in the course of its investigation of the Respondent.

Originally, ten charges were preferred against Respondent. These charges may be briefly summarized as follows:

Charge 1—That Respondent had failed to pay certain costs assessed against him as a result of early disciplinary proceedings.

Charge 2—That Respondent solicited the employment of one Mrs. Clara Beighley of New Castle, Pennsylvania, in a claim against the Baltimore & Ohio Railroad.

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* It seems appropriate to note that Mr. Brownlee has appeared frequently in this Court as the representative of the B. & O. Railroad; but see, Tr. 774 where this line of inquiry was forbidden.

Charge 3—That Respondent, acting through an authorized agent, solicited the claim of one Mrs. Naomi Clark against the Baltimore & Ohio Railroad.

Charge 4—That Respondent solicited, through an agent, namely, Michael Orlando, the claim of one Sam Cotellesse against the P. L. & E. Railroad.

Charge 5—That Respondent attempted to solicit, through an agent, namely, Michael Orlando, the claim of one James F. Quinn against the Baltimore & Ohio Railroad.

Charge 6—That Respondent personally attempted to solicit the claim of Andrew Buletko against the P. L. & E. Railroad.

Charge 7—That Respondent, through an agent, namely, Louis E. McKinney, solicited the claim of one Mrs. Rakestraw against the Pennsylvania Railroad.

Charge 8—That Respondent advanced certain monies to Mrs. Beighley, Mrs. Clark, and Sam Cotellesse while handling their claims and deducted said advances from settlements of their claims.

Charge 9—That Respondent promised to advance money and later did advance money to one Andrew Masters during the pendency of his case against the Pennsylvania Railroad.

Charge 10—That Respondent was guilty of unprofessional conduct in attempting to influence one Elija Doster in that he endeavored to have Doster sign a false statement that Doster had not been contacted by the Respondent in an effort to have Doster help in the solicitation of the case of Naomi Clark and that at the time Respondent attempted to take said false statement from Doster and he paid him the sum of $50.00 in cash.

In the latter part of 1962, a three-member hearing panel was convened for the taking of evidence and for a report on the charges made against Respondent. During the course of this hearing, four additional charges were preferred against the Respondent. These charges may be briefly summarized as follows:

Charge 11—That Respondent attempted to intimidate Samuel Doster who was to appear before the hearing panel and that Respondent gave said Samuel Doster a fifth of whiskey and $5.00 for the purpose of prevailing upon him to prevent his father from appearing as a witness.

Charge 12—That Respondent, through one or more of his agents acting on his behalf, attempted to intimidate witness Andrew Masters by having his agent offer Masters the sum of $300.00 to keep him from appearing before the panel.

Charge 13—That Respondent conspired with Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer.

Charge 14—That Respondent, through Michael Orlando, solicited the right to represent Amerzia Montgomery and his wife, Mildred Montgomery, in their claims on behalf of their minor daughter, Sheila. As is readily apparent, many of the above-summarized charges are of a most serious character.

The proceedings before the three-member panel were lengthy (the record covering 1033 pages), in part extremely bitter,* and in content extremely extraordinary. The record of the proceedings is replete with charges of actual or attempted intimidation of witnesses. The record

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* See, for example, Tr. pp. 154, 510, 558 and 758.

further contains at least one instance of admitted perjury and other instances where persons obviously perjured themselves.

The alleged misconduct on the part of the Respondent with regard to the proceedings themselves is, in large part, reflected in the charges which have been set out above. The charges or indications of misconduct in the prosecution of the Respondent in large part arise out of the involvement of the Association of American Railroads in the proceedings. Generally, the charges made against the Association of American Railroads relate to intimidation of witnesses and the suborning of perjury.

The involvement of the Association of American Railroads in the proceedings was not insignificant, in fact quite prominent; and, as noted above, it is evident that the disbarment proceedings grew out of an investigation conducted by said Association. It seems equally evident, from a review of the entire record, that representatives of the Mahoning County Bar relied heavily upon the work of the said Association in the prosecution of the Respondent. In fact, throughout the hearing, the Association had the following four representatives present:

> The Assistant Director, J. A. Sherman of Chicago, Illinois;
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> His Assistant, J. V. Lynch of Memphis, Tennessee;
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> Investigator, F. N. Van Luit of Rochester, New York; and
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> Investigator, Charles S. White of Pittsburgh, Pennsylvania.

Were this Court to indulge in innuendo, it would have to conclude that charges made against the Association of American Railroads are credible. To a certain extent the nature of this Association's involvement in disciplinary

proceedings is demonstrated by the following quote from a speech given in 1956 by one Kenneth A. Carney, head of the Claims Research Bureau of the Association:

> "There have been successfully (sic) disbarment proceedings tried in Oklahoma City, in Chicago, in Ohio, and one of the nice things that I like about all of this is that it is being accomplished in such a way that the bar associations handling these matters are convinced that such action is more in their interest than ours. And their selfish interest is aroused to the point where they have thus far carried the load for us in practically every proceeding that has thus far been instituted."
>
> (General Claims Division, Association of American Railroads, 67th Annual Meeting, Shamrock-Hilton Hotel, April 18-20, 1956, Houston, Texas, p. 108.)

This organization's conduct has not escaped unfavorable comment by the courts. In *In re Heirich*, 140 N. E. 2d 825, 10 Ill. 2d 357 (1956), the Supreme Court of Illinois made the following comments with regard to the involvement of the Association of American Railroads in the prosecution of one B. E. Heirich:

> "There seems to be no question but what a group of railroads commenced this prosecution and that they hired George Ericksen to prepare the complaint and secure the evidence. This he proceeded to do without a conscience. We are sure that we are not doing violence to this record when we say that Ericksen, in constructing the case against Respondent, was guilty of subornation, bribery, deceit, trickery, entrapment and false impersonation. * * *"

That members of the Association of American Railroads evidently condone the attitude reflected in Mr. Carney's speech certainly does not commend members of

said Association to the admiration of the Bar. While it is an obvious truth that the railroads have, over the years, been unjustly injured as a result of unethical practices of some attorneys, and while it is further clear that the railroads have an absolute right to attempt to remedy such injustices, it nonetheless follows that they should not be permitted to use legal ethics or bar associations as a banner under which to unscrupulously advance their own economic self interests.

Other Courts have in the past and will in the future comment adversely upon any bar association or members thereof who become a party to an effort on the part of any special interest group to serve their own interests by or through disciplinary proceedings against members of the bar. As stated so eloquently by Justice Cardozo in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 162 N. E. 487:

> "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."

In this vein, the comments of the Supreme Court of Missouri in *In re Sizer*, 267 S. W. 922, 924 are very much in point:

> "While the charges are nominally filed by officers of the bar associations, they were clearly induced by the representatives of the corporations aforesaid. The bar associations took up this case at such suggestions. It does not clearly appear in the record, but it can well be inferred from what does appear, that these corporations are financing this case. That they financed Pendell is openly admitted. That they were contributing to a fund at the rate of $50.00 each per month is candidly stated. This much more than paid Pendell and his legitimate expenses. How long these payments were to continue does not appear, but we are but humans, and can draw conclusions from

admitted facts. The evidence further discloses that feelings ran high in Kansas City, and an attempt was made to organize another bar association in that city on the pretense that the then present association officers were men largely engaged in protecting corporation clients from damage suits. These lawyers were largely engaged by plaintiffs in damage suits and they proceeded through their investigators to investigate the defending damage suit lawyers and from dissatisfied clients, the evidence shows many affidavits were obtained against some of them. No action was ever taken upon them, however, and the proposed new association never materialized. Sizer & Gardner had nothing to do with the Kansas City move. It clearly appears that the move first started in Kansas City, as stated above, and finally Sizer & Gardner were made the subjects of investigation before the present action.

"Let us speak plainly, as Courts should speak, and say that every earmark of the evidence in this case shows that it is an effort by corporation lawyers as against what they call damage suit lawyers. All this (true as it may be, and as we think it is) does not change the case. The motive for preferring the charges is of small consequence, if, in fact, the charges are sufficient in law, and the respondents are guilty. So that we can concede a contest (upon the one side) by the defending corporation damage suit lawyers and the prosecuting damage suit lawyers upon the other, and the case yet remains as to the sufficiency of the proof. If the bar associations, sua sponte, had preferred the charges, we would have one background, but where the corporation lawyers of the associations have induced the associations to act upon evidence procured by a special expert, such as Pendell, the background is different. We have to take the picture as it is made to appear. Fifty per from a long list of interested corporations will cover much more than Pendell got for procuring affidavits. Such is a general

outline. In our limited experience at the bar we represented (at different periods) both sides of such cases as are involved here, and we hope not to overdraw inferences from the evidence before us."

At the conclusion of the hearing, the hearing panel found that Charges Nos. 3, 8, 9, 10, 11, 12 and 13 had been proved and that Respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the panel and the record, the Board of Commissioners on Grievances recommended that Respondent be disbarred.

Under the procedures established for disciplinary proceedings, the matter then went before the Supreme Court of Ohio. In *Mahoning County Bar v. Ruffalo*, 176 O. S. 263, 199 N. E. 2d 396 (1964), the Supreme Court of Ohio made this comment with regard to its responsibility:

"In cases of this kind, the Board of Commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts."

On the basis of certain admitted facts, the Ohio Supreme Court, with Judge Herbert dissenting, concluded that Respondent was guilty of a breach of professional ethics with regard to matters contained in Charges No. 8 and No. 13.* The Court made only one brief reference to the other charges made against the Respondent. In the last paragraph of the Per Curiam opinion, the Court stated that:

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* Judge Gibson, in a concurring opinion, expresses considerable doubt as to some of the conclusions reached by the majority.

"The members of this court are not in agreement as to whether the facts are as the Board of Commissioners recommended they should be found with respect to some of the other charges against Respondent. However, in view of the admitted facts with regard to charges No. 8 and No. 13 and the previous judgment of 1957 and the attitude of Respondent with respect thereto, we are of the opinion that Respondent should be suspended for an indefinite period from the practice of law."

It is not surprising that the Supreme Court of Ohio did not, on the basis of the record presented, make findings with regard to the other charges. Where, as here, serious charges of misconduct are made; and, where, as here, those charges substantially affect the credibility of all, or nearly all of the witnesses it would be impossible to make, judiciously, findings of fact without having had the benefit of a personal confrontation with said witnesses.

Since the proceedings in this Court are predicated upon the findings of the Ohio Supreme Court, this Court's consideration will be limited to those charges upon which findings were made by the Ohio Supreme Court.

While, as noted above, the "record" presented to this Court is in many respects distressing, it must nonetheless be noted that the evidence with regard to Charges No. 8 and No. 13 is undisputed and, therefore, untainted by charges and countercharges of misconduct in the prosecution of the State disbarment proceedings. This being so, the evidence with regard to Charges No. 8 and No. 13 must be viewed outside of the shadow cast by the unresolved charges of misconduct.

In *Theard v. United States,* 354 U. S. 278 (1957) the Supreme Court made the following comments relative to federal disbarment proceedings predicated upon disbarment by a state court:

"While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The Court's control over a lawyer's professional life derives from his relation to the responsibilities of a Court. * * *

"Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling v. Radford,* 243 U. S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts."

In *Selling v. Radford,* 243 U. S. 46 (1917) the Supreme Court made the following observations relative to the responsibility of the federal judiciary in cases such as the present:

"In other words, in passing upon the question of the right to continue to be a member of the Bar of this court, we think we should recognize the absence of fair private and professional character inherently arising as the result of the action of the Supreme Court of Michigan so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar. That is to say, we are of opinion that we should recognize the condition created by the

judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear:

1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

Respondent herein urges that the admitted facts do not constitute a sufficient ground for disciplinary action; and, therefore, "under the principles of right and justice" he should not be disbarred from practice in this court.

CHARGE No. 8.

The admitted facts with regard to Charge No. 8 are as follows. Clara Beighley and Naomi Clark were both widowed by the death of their husbands in railroad accidents. Respondent represented both women in actions brought under the Federal Employers' Liability Act. During the period of years in which he represented these women, Respondent from time to time made small advances to both in order that they might meet certain living expenses. The amounts advanced were to be repaid regardless of the outcome of the litigation. Ultimately, the advances were deducted from the proceeds of settlements

of their claims. The advances to Mrs. Beighley totaled $1,025.00 and those to Mrs. Clark totaled $711.00.

In holding that the Respondent acted improperly in making the aforementioned advances, the Ohio Supreme Court made, inter alia, the following observations:

> "Canon 10 provides:
>
> The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.
>
> "Canon 42 reads:
>
> A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement.
>
> "It is clear that the word, 'expenses' appearing after the semicolon refers to 'expenses of litigation.' It would not include advances of the kind admittedly made by respondent for 'living expenses * * * during the period between the filing of and the trial or disposal of the case.' See opinion 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A., Journal 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association v. McCallum* (1930), 341 Ill. 578, 173 N. E. 827, on this question with Canons 10 and 42.
>
> "It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds receiving on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons con-

template that this will be proper only where the advance is for 'expenses of litigation.'" 176 Ohio St. 263, 264, 265.*

In *People, ex rel. Chicago Bar Association v. McCallum,* 173 N. E. 827 (1930), the Illinois Supreme Court made the following comments with regard to the propriety of advancing funds to needy clients:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim. *Christie v. Sawyer,* 44 N. H. 298; *Shapley v. Bellows,* 4 N. H. 355. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we

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* The views expressed by the Ohio Supreme Court are nearly identical to those expressed in opinion No. 288 of the Legal Ethics Committee of the American Bar Association.

> are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered. *Johnson v. Great Northern Railway Co.*, 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140; *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999. By canon 42 of the Ethics of the American Bar Association, it is permissible for an attorney to advance costs and court charges for his client, with the understanding that the same are to be ultimately paid by the client."

As the Ohio Supreme Court has itself noted, the above-quoted portion of the Illinois Supreme Court's opinion in *People, ex rel. Chicago Bar Association v. McCallum, supra,* may not be reconciled with the Ohio Supreme Court's per curiam opinion in *Mahoning County Bar Association v. Ruffalo.*

In *McCallum,* as in *Ruffalo,* reference is made to Canon 42. That canon provides as follows:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

As the portion of Canon 42 preceding the semicolon provides, an attorney may not properly agree to pay or bear the expenses of litigation. See: *Peck v. Heurich,* 167 U. S. 624 (1897), *Watkins v. Sedberry,* 261 U. S. 571 (1923). As may readily be noted, Canon 42 further provides, however, that such expenses may be advanced *subject to reimbursement.*

It seems clear that Canon 42 in its entirety is concerned solely with the specific matter of expenses such as court costs, etc., and not with "living expenses" of the client. In providing that an attorney may, under certain circumstances, properly advance expenses of litigation,

Canon 42 neither implicitly nor explicitly provides that advances which are subject to reimbursement, but which are made for other purposes, are otherwise improper.

In *Ruffalo,* the Ohio Supreme Court, after concluding that the advances in question in effect constituted the purchase of an interest in the subject matter of the litigation, then went on to say that such a "purchase" is proper only to the extent that it covers expenses of litigation. In this Court's opinion, the canons provide no exception to the prohibition contained in Canon 10. To say that the latter portion of Canon 42 provides an exception to Canon 10 in effect is to say that Canon 42 contemplates that any advances subject to reimbursement, including advances of the expenses of litigation, constitute a purchase of an interest in the subject matter of the litigation. In this Court's opinion, such a construction is entirely unwarranted. As the Court has already noted, that portion of Canon 42 following the semicolon merely provides that advances of the expenses of litigation subject to reimbursement are proper, and in no manner indicates that they are otherwise improper. As will subsequently be noted, this is not to say, however, that under all circumstances advances subject to reimbursement are actually proper.

In *McCallum,* the Illinois Supreme Court does not say that the advances there involved were specifically justifiable under Canon 42. Rather, the Court appears merely to be making an analogy between the advances it was considering and the advances authorized by Canon 42.

In holding that the Respondent herein purchased an interest in the subject matter of the *Beighly* and *Clark* litigation, the Ohio Supreme Court did not hold that all loans to clients are improper. In this regard, the comments of the Connecticut Supreme Court in *Grievance Committee*

of Fairfield County Bar. v. Nevas, 139 Conn. 660, 666-667, 96 A. 2d 802, 805 (1963) appear to be most pertinent:

> "By loaning money to his client, the defendant put himself in a position where his personal interest might well become adverse to hers. The making of such a loan by a lawyer is not, however, necessarily unethical conduct. It is unethical only if the loan is made to accomplish some purpose contrary to the client's welfare or if, in seeking repayment, the lawyer pursues practices which are unfair or unduly oppressive."

Other courts have reached the same conclusion. See: *Hildebrand v. State Bar,* 18 Cal. 2d 816, 824; 117 P. 2d 860, 863-864 (1941); *Mytton v. Missouri Pacific Railroad Co.,* 211 S. W. 111 (1919); *State ex rel. The Florida Bar v. Dawson,* 111 So. 2d 427, 430 (1959); and see, also, *Mahoning County Bar Association v. Ruffalo,* concurring opinion by Gibson, J.:

> "Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics."

This Court concludes that the practice of making loans to clients is not *per se* unethical.

While it would be unethical to promise to make loans in an effort to obtain a prospective client's business, or to accomplish a purpose contrary to the client's interest, or to use unfair tactics in seeking repayment, no such contention was made in the instant case.

The record in this case does not indicate that Respondent was engaged in a wide scale practice of making substantial loans to a large number of his clients. On the contrary, the evidence indicates that Respondent made loans to relatively few clients; that the loans were made after the clients had retained Respondent to represent

them; that the loans were made at the request of the client; and that the amounts of the loans were, considering the period over which they were made, not substantial in amount. Under these circumstances, it would be unreasonable to find that the making of these loans by the Respondent constituted a practice calculated to solicit employment by others or as a gimmick to unethically advertise his services.

The question remains as to whether, under the circumstances, the advances in question constituted a purchase of an interest in the subject matter of the litigation. In this regard, it must be noted that the evidence to the effect that the clients had an unconditional obligation to repay the advances is as uncontroverted as the fact that the loans were made. In finding that the advances in question "in effect" constituted a purchase, the Ohio Supreme Court did not find that the obligation of Respondent's clients to repay the advances was in any manner conditional. Rather, the Court merely stated that:

> "* * * Where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting."

The record of the State disbarment proceeding does not contain any direct evidence relative to the ability of Mrs. Beighly and Mrs. Clark to repay the amounts advanced by Respondent out of funds other than those received on trial or settlement of their claims. The record does indicate, however, that at the time the advances were made,

said clients were probably in a desperate financial condition. Under these circumstances, it would seem reasonable to infer that it might have been most difficult for the clients to repay the advances out of funds other than those obtained from the trial or settlement of their cases. It may not, however, in this Court's opinion, be reasonably inferred under these circumstances that it would have been impossible for the clients to repay the advances out of funds which might subsequently have become available from sources other than the trial or settlement of their cases.

It is not in consonance with this Court's concept of justice or the underlying purposes of the Canons of Professional Ethics that a loan otherwise proper is rendered improper because of the indigency of the client. In *Reece v. Kyle*, 49 O. S. 475; 31 N. E. 747, 750, the Ohio Supreme Court made the following comments:

> "* * * Beyond this, the propriety of accepting compensation by way of a fee contingent upon the event of the suit, and payable out of the thing recovered, has been recognized. Also the advancing by the attorney, for the benefit of the client, of funds in payment of costs and necessary incidental expenses. Indeed, such advances by the attorney in the progress of litigation, is so common that to denounce the practice as improper would be to condemn the daily acts of the most honorable members of the profession. *Wylie v. Coxe*, 15 How. (U. S.) 415; *Stanton v. Embrey*, 93 U. S. 548; *Allard v. Lamirande*, 29 Wis. 502; *Newkirk v. Cone*, 18 Ill. 449; *McDonald v. Railroad Co.*, 29 Iowa 171; *Quint v. Mining Co.*, 4 Nev. 304. This upon the idea of duty on the part of the profession to investigate the claims, and give professional aid in redressing the wrongs of the indigent who have been injured, for in this way many poor people are enabled to obtain justice, where, without such aid they would be rem-

> ediless. And it has been considered that there is no practical distinction between such an arrangement and one where counsel undertake, for an agreed fee, to be paid in the future, the prosecution of a case for a client so poor that unless the cause be gained the attorney could not possibly realize any compensation whatever. That a contract of the latter kind is legal was held in *Moore v. Trustees*, 9 Yerg. 115. * * *"

In its opinion in *Ruffalo*, the Ohio Supreme Court, after noting that *Reece v. Kyle, supra*, was decided prior to its adoption of the Canons of Professional Ethics made the following comment:

> "In view of the adoption of the canons, those cases (including *Reece*) would no longer be applicable to the extent that they are inconsistent with the provisions of the canons."

It appears that under Canon 42 the contract which was before the Ohio Supreme Court in *Reece* might well be now technically improper. It does not appear, however, that the reasoning in *Reece* relative to the problems presented in cases involving indigent litigants is in any manner inappropriate or in conflict with the Canons of Professional Ethics.

In his dissenting opinion in *Ruffalo*, Judge Herbert makes the following pertinent comments relative to the problems confronting the indigent litigant:

> "In the case at bar, Respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.
>
> "For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the de-

pendents, through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

"The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimants.

"Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hunger."

In Section 542 of the *Restatement of Contracts*, the following illustration is set forth:

Illustration No. 2.

"A, an attorney at law, undertakes to prosecute a claim of B, a poor person who has been hurt in an accident. B promises that A shall have one-fourth of the recovery as his fee. A does not agree to pay the expenses of enforcing the claim but knows that he will have to advance the money needed, since B is without funds. The bargain is not illegal, and A may retain from the amount recovered the agreed fee and also the expenses of enforcement of his claim."

The above-quoted illustration from the *Restatement of Contracts* merely reflects the traditional attitude of fairness which the courts have taken toward the relationship between attorneys and indigent clients, and is thoroughly consistent with Canon 42.

Whether it be the attorney's fee, the expenses of litigation, or unconditional loans, the fact that it might be difficult or unlikely that the client will be able to reimburse

the attorney for the same absent a recovery on his claim should not render the attorney's conduct improper. While the Mahoning County Bar Association has urged that a different approach must be taken with regard to loans, it has not presented, nor can this Court discern, any reasonable basis for taking a different approach with regard to the same. The Court finds that the advances made by the Respondent did not constitute the purchase of an interest in the subject matter of the litigation in violation of Canon 10. The Court further finds that the conduct of the Respondent with regard to such advances was not in any other respect improper. Therefore, the conduct complained of does not constitute a ground for disbarment from practice before this Court. To the extent that the Ohio Supreme Court's views in *Ruffalo v. Mahoning County Bar Association* are different than those expressed herein, the Court respectfully disagrees with the same and declines to follow them.

CHARGE No. 13.

From 1957 until 1961 Respondent employed one Michael Orlando as an investigator, paying him as follows:

1957	$2950.00
1958	1250.00
1959	1237.37
1960	3829.25
1961	4716.00

During this same period Orlando was also employed by the Baltimore & Ohio Railroad as a car bleeder, that is to say, he was responsible for bleeding air out of train brakes. His hours of employment for the Baltimore & Ohio Railroad were from 11:00 p.m. to 7:00 a.m. His hours of employment for Respondent were during the daytime when he was not employed by the Baltimore & Ohio Railroad.

While Respondent admits that Orlando spent some of his time during the five-year period (1957-1961) investigating cases involving the Baltimore & Ohio Railroad, there is no evidence to indicate what percentage of time he was so employed.

It was noted at the outset that among the original charges brought against Respondent were those to the effect that Respondent employed Orlando to solicit cases, and it was further noted that it was not surprising that the Supreme Court of Ohio made no findings with regard to those charges. Almost at the very beginning of the State disbarment proceedings (Tr. 27) the matter of Orlando's employment by Respondent and the adequacy of his payment records were first inquired into, and the same continued to be inquired into from time to time throughout the trial. This line of questioning, the testimony elicited thereon, and the exhibits used were relevant only insofar as they tended to support the solicitation charges. However, much later in the proceedings (Tr. 656 et seq.) members of the hearing panel inquired of Respondent as to the propriety of employing a railroad employee as an investigator in cases where the railroad employer was a party. The inquiry by the panel members in this regard was rather esoteric in nature because they did not inquire into the duties or circumstances of Orlando's employment in any of the cases involving the Baltimore & Ohio Railroad and Respondent's claimants. In any event, in the middle of this colloquy (Tr. 662) counsel for the Bar Association, *relying only on the evidence admitted up to that point* (Tr. 671, 672), moved to add an additional specification, charging Respondent as follows:

> "That Respondent did conspire with one, Michael Orlando, and paid said Michael Orlando moneys for

> preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all the periods of time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company."

The panel, over vigorous objection of the Respondent on the grounds of timeliness and surprise, allowed the additional charge. Thus the "evidence" introduced on the solicitation charge (which the Ohio Supreme Court, in substance, dismissed) suddenly, without notice, and at least half-way through the trial became relevant to a wholly new charge not theretofore contemplated by any of the the parties. The charge Respondent faced at this juncture was one of "conspiracy" to engage in a "deceptive practice" which is "morally * * * and legally wrong as respects the employee, Michael Orlando, toward his employer, the Baltimore & Ohio Railroad."

Notwithstanding the fact that no evidence was admitted to prove that Respondent's employment of Orlando encouraged or resulted in any actual conflict of his duties owed to the Baltimore & Ohio Railroad, this added charge constituted one of the two grounds on which he was indefinitely suspended from the practice of law in Ohio.

At the outset of discussion on this basis for disbarment, it must be noted that the employment of an individual to do work in any manner related to the operations of that individual's regular employer is a practice which might well be fraught with difficulties, and that the regular employer might well be sensitive in this regard. In the present case it is clear that Respondent realized that the Baltimore & Ohio Railroad might cast a jaundiced eye towards Orlando's employment by Respondent to the

extent that it involved investigation of cases to which it was a party. Under these circumstances, it might have been the soundest and most appropriate course of action for the Respondent to have limited Orlando's investigative work to cases other than those involving the Baltimore & Ohio Railroad.

While this Court believes that Respondent might not, under these circumstances, have employed the soundest and most appropriate course of action, the question remains as to whether the course of action which Respondent did follow constitutes a ground for disbarment for practice before this Court.

There need be no citation of authority for the principle that an attorney may not, under any circumstances, employ an individual to do work contrary to or in violation of a fiduciary duty that said individual owes to another party. This general principle of law is manifestly inapplicable to the instant case because Orlando clearly owed no fiduciary duty to the Baltimore & Ohio Railroad. Rather, his employment by the Baltimore & Ohio Railroad was of a most menial nature.

The record of the State disbarment proceedings contains very little evidence relative to the exact nature of the activities of Orlando as an investigator for Respondent. The evidence with regard to Orlando's activities as an investigator is summarized in the following statement made by the Respondent:

> "His job specifically has been to investigate cases which I turn over to him to investigate particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge and the operation of railroads, and on occasion to transport witnesses for me." (Tr. 765.)

There is no evidence, nor is there any claim made, that Orlando trespassed upon Baltimore & Ohio Railroad property to obtain information relative to cases involving the Baltimore & Ohio Railroad.* Further, there is no evidence, nor is there any claim made, that Orlando used surreptitious means in order to obtain confidential information held by the Railroad, or, for that matter, that Orlando in any other manner obtained such information. See, *In Re Noell*, 234 Mo. App. 1162, 96 S. W. 2d 213 (1936); and *In Re Newell*, 174 App. Div. 94, 160 N. Y. S. 275 (1916).

It is noteworthy that Respondent did not hire Orlando specifically to investigate cases involving the Baltimore & Ohio Railroad. Rather, he hired Orlando to investigate all of his railroad cases. This factor, it would seem, substantially negates any contention that Respondent's employment of Orlando was for the purpose of taking unfair advantage of Orlando's status as an employee of the Baltimore & Ohio Railroad.

As noted above, the employment of an individual to do such investigative work may well be a matter towards which the regular employer will be sensitive. However, in judging the conduct of an attorney the Court must consider the sensitivities and interests of all parties without subservience to any of them. Here we have under attack the conduct of an attorney in his effort to serve the interests of his clients. In the preparation of litigation, counsel for both sides necessarily engage in conduct towards which the other side will be sensitive. This is to be expected in adversary proceedings. Where an attorney is charged with

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* In *Ry. Clerks v. Atl. Coast Line RR Co.*, 154 F. Supp. 71, aff'd., 253 F. 2d 753. It was held that a railroad employee may properly be discharged where he allows an investigator to trespass upon company property in order to obtain pictures to be used in litigation against the railroad.

acting contrary to the interests and sensitivities of an opposing party, it would seem that the ultimate and paramount question is not whether the conduct is contrary to the private interests of the opposing party, but, rather, whether the attorney has taken unfair or unethical advantage of the opposing party. In the present case it, therefore, must be determined whether, under the evidence presented, it has been shown that Respondent, by employing Orlando, took unfair advantage of the Baltimore & Ohio Railroad.

Litigation by its very nature often results in an estrangement of traditional loyalties. Thus, where an employer and an employee become involved in litigation, their respective interests may be diametrically opposed. Both the employer and employee may well believe that the other has taken an unreasonable position, and that in the taking of such an unreasonable position there has been a breach of a mutual duty of fidelity. Even though both parties may be proceeding in the utmost of good faith, such feelings often may not be avoided.

In the investigative aspect of litigation, traditional loyalties are likewise to be strained or distorted. This difficult problem has to a certain extent been met by various legal doctrines adopted by the courts, statutory provisions, and rules of ethics. For example, the various common law and statutory "privileges" have a most significant effect in this area. Rules of ethics, such as Canon 39 of the Canons of Professional Ethics, likewise have a significant effect. That canon provides:

"*Witnesses*

"A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In so doing, however, he should

scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

Further, Section 60 of 45 U. S. C. A., a statutory provision which has been the subject of much discussion in this litigation, clearly meets the possible problem of a distorted concept of loyalty. That section provides:

"Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

"If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby."

It would be a work of supererogation to review all statutory or legal doctrines which, either directly or tangen-

tially, bear upon the problem under consideration. Suffice it to say that the above-mentioned statutory and judicially adopted doctrines are representative of those which bear upon the problem.

It has been a long-standing and accepted practice for corporations to employ persons to investigate claims which their fellow employees have made against their common employer. It is also a long-standing practice for these investigators to aid both inside and outside counsel in litigation which results from such claims. Surely an employee-claimant may personally consider that the employment of such an inside investigator and his use by the corporation's attorneys is not in consonance with mutual duties of fidelity existing between his employer and him, and between fellow employees. Notwithstanding mutual duties of loyalty, it is clear that the practice of employing such an investigator and the use of his services by the corporation's attorneys is proper.* The essential justification for such a practice is that the ultimate purpose of the adversary system (both investigation and litigation functions) is to secure the truth, and, thus, justice. To use the concept of loyalty to preclude efforts to secure the truth is, with certain limitations, a policy which may not be justified.

While the ultimate goal of the investigative function is to secure the truth, it would be naive to even suggest that investigators employed by corporations are always unbiased and objective in their investigation of a particular matter. This fact has not, however, and should not be used as a basis for holding that practice of employing such investigators and the use of their services by a company's attorneys is improper in that it might not always

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* It should go without saying that the same principle applies in many areas of the employer-employee relationship.

result in its salutary purpose—the truth. Rather, courts have condemned the practice only where it has been shown that it has been unfairly and immorally used.

As indicated above, where an attorney, in representing the interests of his clients, employs as an investigator an individual who is also employed by a party against whom his clients are making claims, it might well be that said other party will consider the employment of its employee and his use by the attorney as not in consonance with the employee's duty of fidelity. This is not unlike the feeling which an employee might experience when his employer and its attorneys used one of his fellow employees to investigate a claim which the employee has made against his employer. Since the latter practice has never been considered to be *per se* improper, consistent logic dictates that the former practice likewise must not be considered to be *per se* improper. The salutary purpose and the justification for both practices is that they are directed towards the ascertainment of the truth. That both practices are open to abuse is manifest. The point is that while neither practice is *per se* improper, the abuse of either is clearly improper.*

In *Mahoning County Bar Association v. Ruffalo, supra,* the majority opinion seems to take the position that it is *per se* improper for an attorney to employ as an investigator an individual who is also employed by a party against whom his clients are making a claim regardless of that employee's duties for either employer. This Court considers that position to be erroneous and, therefore, respectfully refuses to follow the same.

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* During the oral arguments held on April 29, 1965, the Court asked certain questions relative to the principles which have just been discussed. In its brief which was filed after these arguments, the Mahoning County Bar Association completely avoided any discussion of the same.

In light of what has been stated above, the Court finds that Respondent's use of an employee of the Baltimore & Ohio Railroad to investigate cases involving said Railroad was not a practice which was *per se* improper. Notwithstanding the fact that the practice is not *per se* improper, the question arises as to whether it has been shown by competent evidence that Respondent's use of Orlando was otherwise improper. Again, the only evidence with regard to Orlando's actual activities is adequately summarized in the following testimony of the Respondent:

> "His job specifically has been to investigate cases which I turn over to him to investigate particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge and the operation of railroads, and on occasion to transport witnesses for me." (Tr. 765.)

There is no evidence or claim made that Orlando had a fiduciary duty to his employer and that Respondent caused a breach thereof. On the contrary, it is clear that no such fiduciary relationship existed. There is no evidence or claim made that the Respondent either caused Orlando to perform work for the Respondent during the hours when he was employed by the Railroad or that Orlando actually did such work during these hours. There is no evidence or claim made that Respondent either caused Orlando to trespass upon the property of the Baltimore & Ohio Railroad in order to obtain information for Respondent, or that Orlando actually did so trespass. There is no evidence or claim made that Respondent caused Orlando in any manner to influence the testimony of any persons whom he interviewed, or that Orlando actually did attempt to influence such testimony. Further, there is no evidence or claim made that Respondent in any other manner

caused Orlando to take unfair advantage of the Baltimore & Ohio Railroad in the performance of his duties as an investigator, or that Orlando so did.*

This Court is of the opinion that the evidence is entirely insufficient to support a finding that Respondent caused Orlando to engage in unfair and unethical practices in the actual investigation of Respondent's cases. Moreover, no contention has been made in this specific regard.

As has previously been noted, the majority opinion in the *Mahoning County Bar Association v. Ruffalo,* in effect, holds that the employment of Orlando was *per se* improper. During the course of the State disbarment proceedings, Respondent stated that he did not keep detailed records relevant to Orlando's employment for the reason that he feared that the Baltimore & Ohio Railroad might be sensitive towards Orlando's employment by Respondent. In holding that the employment of Orlando was *per se* improper, the Court stated that notwithstanding Respondent's claim that such employment was not *per se* improper, the testimony relevant to Respondent's efforts to protect Orlando showed that he knew such employment was actually improper. This Court, having found that Respondent's conduct was not *per se* improper, and no contention having been made or direct evidence offered that Respondent caused Orlando to engage in unfair and unethical conduct in the actual investigation of Respondent's cases, it may not reasonably be found, on the basis of Respondent's statements to the effect that he was trying to protect Or-

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* Again, it should be noted that while Respondent was charged with using Orlando to solicit cases, the Ohio Supreme Court did not make findings with regard to said charges; and that this Court will not, under the circumstances previously discussed, make findings with regard to said charges either directly or indirectly.

lando, that Orlando, in effect, acted unfairly or unethically in the actual investigation of Respondent's cases.

This Court finds that Respondent has, under the principles enunciated by the United States Supreme Court in *Selling v. Radford, supra*, shown cause why he should not be disbarred from practice before this Court.

At the present time disbarment proceedings against the Respondent are pending in the Sixth Circuit Court of Appeals. Since the issues raised in the Sixth Circuit Court of Appeals are identical to those raised here, a final order will be deferred pending a decision by that Court. In the meantime, an order will be entered restoring Respondent to practice before this Court. In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings. Otherwise, a final order will be entered consistent with conclusions reached in this memorandum opinion.

APPENDIX C.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided December 29, 1966.)

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

O'SULLIVAN Circuit Judge. Upon the Supreme Court of Ohio's certification to us that respondent John Ruffalo, Jr., had been indefinitely suspended from the practice of law, we ordered that "John Ruffalo, Jr., show cause if any he has, on or before May 12, 1965, why he should not be stricken from the roll of counsel of this Court."

After extensions granted at the request of respondent, we received his response and brief, as well as a brief amicus curiae by the Ohio State Bar Association in support of the Ohio Supreme Court's order, and the cause has now been argued to a panel of this Court.

In 1962, the Mahoning County Bar Association filed with the Ohio Board of Bar Commissioners on Grievances and Discipline, charges of professional misconduct against respondent Ruffalo. The said Board is made up of seventeen members of the Ohio Bar, chosen, one each, from Ohio's seventeen judicial districts. They are appointed by the Supreme Court of Ohio, pursuant to its Rule XXVII (1) and (3),[1] 167 Ohio St. lxxvii, and act as an arm of that Court.

Fourteen alleged instances of misconduct made up the charges against respondent. The Board of Commissioners convened a panel of three of its members to take evidence on these charges and make an initial report. The charges covered generally acts of solicitation of FELA cases, main-

[1] Now Rule XVIII (1).

tenance of persons asserting claims, attempted bribery, and hiring a railroad employee, Michael Orlando, to act as an undercover agent to assist Ruffalo in soliciting and investigating cases against various railroads, including Orlando's employer, the B & O Railroad.

The panel conducted hearings which extended from December 26, 1962, to August 16, 1963, testimony taken comprising 1,034 pages of transcript. The panel report sustained seven and dismissed seven of the charges. It was unanimously adopted by the seventeen member Board of Commissioners. The charges sustained involved solicitation, maintenance of clients, attempted bribery to dissuade a witness from testifying against Ruffalo, and the use of Orlando as an undercover agent.

The Findings of Fact, Conclusions and Recommendation of the Board were returned to the Ohio Supreme Court. The Recommendation of the Board was that "Respondent be disbarred." The Ohio Court sustained charge 8, maintenance of clients, and 13, use of the undercover agent Orlando. It gave judgment that Ruffalo "be suspended for an indefinite period of time from the practice of law." *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263 (1964). Certiorari was denied by the Supreme Court of the United States. *Ruffalo v. Mahoning County Bar Association,* 379 U. S. 931 (1964). Five members of the Ohio Court joined in the majority opinion, a sixth member concurred in the result, and the seventh dissented. As to five of the charges sustained by the Board of Commissioners covering solicitation, and attempted bribery to dissuade a witness from testifying against Ruffalo, the Ohio majority said,

> "The members of this court are not in agreement as to whether the facts are as the Board of Commissioners recommended they should be found with respect to some of the other charges against respondent."

In deciding that Ruffalo should be suspended from practice, the Ohio Court, in addition to its consideration of the current charges, recited and took into account the fact that in 1957 Ruffalo had been found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people."

Following the Ohio Supreme Court decision, the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to its own rule, commenced an inquiry as to the fitness of Mr. Ruffalo to continue as a practitioner in that Court. The District Judge had before him the record and proceedings which culminated in the decision of the Ohio Supreme Court. He disagreed, however, with that decision and refused to suspend Ruffalo from practice in the District Court. *In re Ruffalo*, 249 F. Supp. 432 (N. D. Ohio, E. Div. 1965). However, he withheld the entry of a final order, reciting that "In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings." The matter before us is not an appeal from the said District Court, but is our own consideration of Ruffalo's standing as a practitioner in this Court.

We should preliminarily observe that our own Rule 6(3), prior to recent amendment, could be read as automatically striking from our roll of counsel the name of any lawyer disbarred in any court of record. It has been amended and we consider this matter in keeping with the requirements and admonitions of *Theard v. United States*, 354 U. S. 278, 1 L. Ed. (2) 1342 (1957) and *Selling v. Radford*, 243 U. S. 46, 61 L. Ed. 585 (1917). These decisions forbid Federal Courts from acting in total reliance on a state judgment. We have before us, and have re-

viewed, the entire record developed by the Ohio proceedings, but think it proper to dispose of the matter primarily upon the charges on which the Ohio Court disciplined Mr. Ruffalo.[2] The facts as to these are not in dispute. We consider whether we find insupportable the Ohio Court's determination that such facts disclosed unprofessional conduct warranting the discipline imposed and whether they warrant similar discipline by us.

The facts as to charge No. 8 are that Ruffalo, during the pendency of their FELA cases, advanced living expenses to three clients. This conduct was found to offend Canons 10 and 42 of the Canons of Professional Ethics. Canon 10 declares that:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

and Canon 42 provides that:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

On this subject, we set out the following extract from the Findings of the Board of Commissioners:

> "While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in

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[2] Our failure to discuss them should not be construed as indicating that we disagree with or find unreliable the other findings of the Board of Commissioners. We cannot accept a contrary assertion in the dissenting opinion. We set out as an appendix hereto the Board of Commissioners' reports on charges 3, 8, 9, 10, 11 and 12, all of which were sustained. The appendix does not cover charge 13 inasmuch as we discuss it at length herein.

that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyer for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testimony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him."

The Supreme Court of Ohio, in agreement with Opinion No. 288 of the Professional Ethics Committee of the American Bar Association, 41 A. B. A. Journal 33 (Jan. 1955)[3] expressed its view that,

"It is obvious that where the advancement of living expenses is made, as in the instant case, to enable a client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The

[3] The late Shackelford Miller, Jr., then, and until his death, a judge of this Court, was a member of, and concurred in the opinion of, the Professional Ethics Committee of the ABA (Opinion No. 288).

> canons contemplate that this will be proper only where the advance is for 'expenses of litigation.' "

In the case of *Dombey, et al. v. Detroit, Toledo & Ironton Railroad,* 351 F. (2d) 121 (CA 6, 1965) we recognized the Ruffalo opinion as apparently announcing the law of Ohio, albeit that it appeared to overrule earlier Ohio decisions. While we are not here required to follow Ohio law, we have thus been made aware of the thinking of its Bar and Supreme Court. The bar of Ohio, acting under its laws and the control of the Supreme Court of that state has a responsibility to maintain the prestige and integrity that should, without exceptions to expediency, be marks of a profession of which we also are members. We may, therefore, give respect to the product of its effort to arrive at and express conceptions as to what is and what is not unprofessional conduct by any Ohio lawyer whom we have admitted to practice before us.

We need not, and do not, announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. We do not reach that question. We are satisfied that with Ruffalo's previous conviction in 1957 of solicitation, and the conduct making up Charge 13, there is sufficient to permit us, consistent with "principles of right and justice," to "allow the natural consequences of the judgment [of the Supreme Court of Ohio] to have their effect * * *," *Selling v. Radford,* 243 U. S. 46, 51, and strike Mr. Ruffalo's name from the roll of counsel admitted to practice in this Court.

The admitted facts of Charge No. 13 are that Ruffalo, apparently a specialist in FELA cases, hired Michael Orlando, an employee of the Baltimore & Ohio Railroad, to act under cover as his agent in investigating cases against various railroads. This undercover work included in-

vestigating and obtaining evidence to be used in Ruffalo's cases against Orlando's own employer, the B & O. The employment extended from 1953 to July 19, 1962, when Orlando was suspended by his railroad employer for allegedly soliciting claims (presumably on behalf of Ruffalo). Ruffalo paid Orlando $25 per day, plus expenses for his work, which was carried on outside of Orlando's regular working hours as a railroad brakeman. Through the years 1957 to 1961 this amounted to a total of $13,982.62, of which $4,176 was paid within the first six and one-half months of 1961. This information had to be obtained from the Internal Revenue Form 1099 withholding slips. No other records were available as Orlando was paid in cash, giving receipts to Ruffalo therefor. Regular entries of these transactions were not made in Ruffalo's books and in response to the panel's subpoena to produce his relevant records, Ruffalo testified that whatever writings had been made were destroyed by him as soon as his income tax returns for 1962 and prior years had been examined by the Internal Revenue Service. The Ohio Court's opinion covers this subject in detail and we recite this much of it:

> "The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961 and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *."

The Court's opinion quotes from Ruffalo's justification for the minimal record keeping and the destruction of whatever records had been made as follows:

> " 'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.' " 176 O. S. 266.

The Ohio Court's reaction to the foregoing is portrayed by this excerpt:

> "The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B & O charged Orlando with soliciting cases against it for Ruffalo. In September 1962, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclu-

sion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B & O and against Ruffalo in the proceedings brought against him." 167 O. S. 268, 269.

Its view that Ruffalo's conduct disqualified him for practice at Ohio's bar is thus expressed:

"The panel questioned the respondent at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages of having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *'." 176 O. S. 266, 267.

* * * * *

"In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar. He is even less qualified if he does so when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so." 167 [176] O. S. 269.

The rules which should guide us here come from *Theard v. United States*, 354 U. S. 278, 1 L. Ed. (2) 1342 (1957); and *Selling v. Radford*, 243 U. S. 46, 61 L. Ed. 585 (1917). In *Theard*, the Supreme Court remanded a disbarment case to the District Court which had disbarred an attorney on the assumption that a decision of the Supreme Court of Louisiana foreclosed independent inquiry by the United States District Court.

The disbarment of Theard took place some eighteen years after the charged misconduct—the forgery of a promissory note—notwithstanding the fact that it was found that at the time of the forgery Theard "was suffering under an exceedingly abnormal condition, some degree of insanity," and notwithstanding that after release from an insane asylum and restoration to capacity he had for six years practiced law, arguing numerous cases before the Supreme Court of Louisiana without any charge of misconduct or impropriety.

This factual dissimilarity with the case before us is not of controlling significance, but does make quite understandable the Supreme Court's insistence on a Federal Court weighing the validity of the state court's conclusions. Mr. Justice Frankfurter, writing the *Theard* opinion did observe, however, that:

> "If the accusation rests on disbarment by a state court, such determination of course *brings title deeds of high respect.*" (Emphasis supplied.)

and emphasized that recognition should be accorded a state court judgment subject, however, to the rule expounded in *Selling v. Radford,* 243 U. S. 46, 61 L. Ed. 585. In that case the Supreme Court allowed an attorney who had been disbarred by the Michigan Supreme Court to show cause why he should not be disbarred in the United States Courts by bringing the record of the state court proceedings before it and filing a brief. That opportunity has been afforded Ruffalo here, and we have followed the rule of *Selling v. Radford,* which we quote:

> "[W]e should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, *that there was*

such an infirmity of proof as to facts found to have established the want of fair private and professional character on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so." 243 U. S. 46, 50, 51, 61 L. Ed. 586, 587, 588. (Emphasis supplied.)

Obedient to that rule, we have formed our own judgment, not, however, unconscious of the fact that six judges of the Ohio Supreme Court and seventeen lawyers of the Bar of Ohio, of such standing as to be selected to serve on the Board of Commissioners on Grievances and Discipline, have, after fair procedure, concluded that Mr. Ruffalo's conduct called for his suspension from practice. We do not find in the record of the state proceedings, "Such an infirmity of proof as to the facts found to have established the want of * * * [Ruffalo's] fair private and professional character" to lead us to a conviction that we cannot, consistent with our duty, "accept as final the conclusion" of the Supreme Court and the Ohio Bar.

Able and distinguished counsel have urged us, on the merits, to disagree with Ohio's assessment of the facts now before us. We consider this matter as judges, but we are aware that we are also members of the bar, sharing with our fellow lawyers a just pride in our profession and we are properly concerned that the legal profession be worthy of the respect that it asks today's society to accord it. We have a responsibility not only to Mr. Ruffalo but also to the prestige of our own court. We cannot find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence

and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be a mark of a lawyer. Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this Court had, and have, the right to draw inferences as to what this conduct portrays. The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?

Respondent argues that the Association of American Railroads was guilty of questionable practice in investigating the misconduct of Orlando and Ruffalo and that the American railroads historically have unfairly resisted and impeded the presentation of claims by their injured employees. Unless we are ready to announce a rule that a lawyer may fight on any level chosen by his adversary, we are not here required to pass on such charges. With the liberal use of our discovery practice, we consider that adequate preparation can be made without resorting to the methods chosen by Mr. Ruffalo. We do not believe we should tell today's society that notwithstanding the respect we ask it to give us as a profession of skillful and high minded men, we do not have the ability to adequately represent our clients except through planting secret agents in the shops of those we call to account in the courts. If this kind of espionage has become a way of life in some of today's business competition, such reality should not prompt us to say that no more is expected of today's lawyers than that they conform to the minimal standards of the market place.

Charge No. 13, the employment of Orlando, was added

as a specification of misconduct during the course of the Board of Commissioners' hearing. Mr. Ruffalo objected to this being done, and the Board advised him that he could have time to offer proofs in opposition to the charge. The charge was based upon testimony of Ruffalo and Orlando already in the record. No request was made for further time, and no additional proofs were offered by Ruffalo on the point. We find no procedural impropriety in this regard. Neither do his counsel raise the question here. They do, however, assert deprivation of due process in that prior to Ruffalo's described use of Orlando, he was never told that such would be looked upon as misconduct. They complain for him that no Canon of Ethics had ever been promulgated forbidding this practice. We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge, and then fashion and announce a Canon of Ethics to fit each act of misconduct. Surely our profession is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior.

This is an original proceeding in this Court. We are not reviewing the ruling by the District Court. Respectful of the careful consideration of the matter by the District Judge, we advise our disagreement with his conclusions. While not controlling, we think it proper to observe that it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state.

The name of John Ruffalo, Jr., is hereby stricken from the roll of counsel permitted to practice before this Court. This discipline shall remain in force until the further order of this Court.

APPENDIX.

FINDINGS OF FACT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE.

CHARGE No. 3.

It is charged that the Respondent, acting through an authorized agent, solicited the claim of Mrs. Naomi Mae Clark against the Baltimore and Ohio Railroad Company by reason of the death of her husband, Major Robert Clark who died August 13, 1957 in an accident while employed as an engine house laborer for the Baltimore & Ohio Railroad.

Naomi Clark testified that her husband had worked for the Baltimore & Ohio Railroad in Newcastle and that he died on August 13, 1957 and that two weeks after her husband's death, Elijah Doster came to see her and told her that the Respondent wanted her case. She further testified that she knew of the Respondent and that a Mr. Orlando and others had talked to her about a week after her husband's death and one of those who had seen her gave her the Respondent's telephone number. She said that Elijah Doster told her that the Respondent was the man to employ and that he was also handling Elijah Doster's claim against the railroad.

It appears that Mrs. Clark had known Elijah Doster for a period of approximately twenty-one years. She testified that arrangements were made through Mrs. Betty Orlando, the sister of Michael Orlando, to meet Respondent in Newcastle and that she did meet him there. Betty Orlando is the sister-in-law of Michael Orlando who was an employee of Respondent and also the Baltimore & Ohio Railroad. On September 3, 1957 Mrs. Clark signed a contract employing Respondent to represent her. The contract (Respondent's Exhibit 4) is a printed form which recites in the printed portion that

"I, the undersigned, do hereby retain John Ruffalo as my attorney, acting only upon my own free will without the inducement or solicitation of any person or persons * * *."

Mrs. Clark testified that she had been told by Elijah Doster that the Respondent would let her have money if she needed any during the time he would have her case, and that when she saw the Respondent in September, 1957 he told her that if she needed money he would give it to her. Mrs. Clark's case was settled on November 18, 1960, for $21,000.00, and the Respondent advanced approximately $600.00 to her from time to time before the settlement.

Elijah Doster testified that he had employed Respondent to represent him in a claim against the Baltimore & Ohio Railroad and that while his case was pending, Respondent called him and asked him to talk to Naomi Clark about her case against the railroad, and that pursuant to this request he did talk to Mrs. Clark about employing the Respondent. Doster testified that Angelo Medura phoned him the day before the hearing by the Panel and requested him not to come to court. It also appears that more than a year after Doster's case was settled, the Respondent contacted Doster and gave him $50.00 as a refund for medical fee which related to Doster's case against the railroad. Doster executed a receipt for the fee, dated July 14, 1961 (Respondent's Exhibit 1) and a year later on June 20, 1962 signed a statement for the Respondent (Respondent's Exhibit 2) to the effect that the $50.00 paid to Doster by Ruffalo "was given to me solely as a refund of the medical bill incurred by an examination of Dr. Robinsteen. Dr. Robinsteen died and was unable to appear for me, requiring me to obtain other doctors. * * *." This statement was witnessed by Doster's son, Samuel Doster.

On July 14, 1961, the same day on which Doster was requested to sign a receipt for the $50.00, he also signed an affidavit at the Respondent's office, which affidavit was prepared by the Respondent (Respondent's Exhibit 6). This affidavit recites that

> "Elijah Doster, after first being duly sworn, according to law, deposes and says that at the request of Mr. Ruffalo, he recommended John Ruffalo of Youngstown, Ohio, to Naomi Clark, that he contacted Gordy Marks of Newcastle, Pennsylvania, the brother-in-law of Naomi Clark, who spoke to her about Mr. Ruffalo, and that he learned a few days after that that Naomi Clark had gone to see Mr. Ruffalo, that after his original contact with Mr. Marks, he had talked with Naomi Clark and she informed him that she had gone out to see Mr. Ruffalo, * * * and that it was upon the recommendation that he had made that she came to see Mr. Ruffalo."

When Respondent was testifying on his own behalf he admitted he asked Elijah Doster to recommend Respondent to Naomi Clark, but says this was done "about 15 or 20 minutes before I had any—before I represented her."

Sam Doster testified that he heard his father state to Mr. Ruffalo that he saw Mrs. Clark at Mr. Ruffalo's request.

It also appears that contact was made by Respondent and Angelo Medura of Newcastle, Pennsylvania, with Sam Doster, relating to the question of Elijah Doster's appearance to testify before the Panel, and that Sam Doster was given $5.00 by Medura and a bottle of Respondent's whiskey. This took place at a meeting between Youngstown and Newcastle on December 24, 1962.

At the original hearing held by this Panel in December, 1962, Sam Doster testified about a discussion between himself and Medura, at this meeting, concerning a charge

of homicide then pending against Sam Doster in Pennsylvania. According to Sam Doster, Medura told him that he knew it would cost quite a fee "And he said 'You know that John can't do it himself,' that 'Whatever you need,' that 'I'll get in touch with John for you, and he would give it to me to give you.' " He further testified that this conversation took place outside of the Respondent's car while Respondent was sitting in the car. However, at a subsequent hearing held by the Panel on August 16, 1963, the same Sam Doster was called to testify on behalf of the Respondent. At this hearing he testified that he lied at the previous hearing; that Medura had offered him nothing to persuade his father, Elijah Doster, not to appear at the hearing before the Panel.

Doster said he'd decided to tell the truth because he realized his testimony at the previous hearing had damaged Respondent and he didn't feel right about it. He said he'd lied because he thought the Respondent had not represented his father properly and had been so informed by some representatives of the American Railroad Association. He could not explain why he decided since the December hearing, to change his story. Since the December hearing, he was tried on the homicide charge in Pennsylvania and found guilty. He was out on bond at the time of the August hearing. Whether this had anything to do with the change in this witness' story was not shown. Because of this recantation by Sam Doster of his testimony at the preceding hearing, the Board has placed no credence whatever in this witness' testimony, given either at the preceding hearing or at the present hearing.

At the hearing in December, 1962 the Respondent offered a tape recording of a conversation between the Respondent and his associate, Mr. Montani, with Elijah Doster. Although the recording was played at one of the

hearings held by the Panel, it was inaudible. At the last hearing held on August 16, 1963, the Respondent produced David Burton, a free lance court reporter, who testified that there had been submitted to him a transcript of the tape recording, which had been prepared by the Respondent's secretary, and that the witness compared this transcript with the recording and corrected the transcript in several respects. The witness' transcript was then offered in evidence as an exhibit. However, the Panel sustained the objection to this exhibit and the Board has given it no consideration for the reason that a witness' testimony concerning his interpretation of a tape recording of a conversation with another witness violates the hearsay rule and the rule excluding the opinions of witnesses except in certain defined exceptions of which this is not one.

The Respondent testified that he was first contacted about the Naomi Clark case, by Mrs. Alexander Orlando, Mike Orlando's sister-in-law, on September 30, 1957, when he had returned from a vacation, and that Mrs. Orlando said that she was a friend of Naomi Clark and that Naomi Clark wanted to see him and he suggested that Miss Clark come to see him, but Mrs. Orlando told him she couldn't come and suggested that the Respondent come to Mrs. Orlando's home. Respondent said that he had never known Mrs. Orlando before, although she was the sister-in-law of Mike Orlando who was then an employee of the Respondent.

Mrs. Lois Scopio, Michael Orlando's sister, testified that she was a bookkeeper at a store in Newcastle where Naomi Clark had purchased a coat, and that Naomi Clark had no money to pay for the balance due on the coat, and in the course of the conversation about her account she asked the witness whether she had ever heard of the Respondent, and then asked the witness to call the Respond-

ent, which Mrs. Scopio said she did, but was unable to reach him because he was on a vacation. She testified that Naomi Clark subsequently told her that she had talked to Betty Orlando, Michael's sister-in-law, and had asked her to get in touch with the Respondent.

CONCLUSION.

It is the conclusion of the Board that the evidence with respect to this charge establishes that Respondent was guilty of misconduct in soliciting employment from Mrs. Naomi Clark in violation of Canon 27 of the Canons of Professional Ethics.

CHARGE No. 8.

It is charged that the Respondent advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. The uncontradicted evidence establishes that Respondent did advance a total of $1,025.-00 to Clara Beighley during the period of time that he represented her, and that he advanced $611.00 to Naomi Clark during the time that he represented her. Respondent's representation of each of these parties extended over a period of several years. Respondent admits that these funds were advanced, but justifies the advances on the ground that they were made as an act of kindness at a time when these clients were in difficult circumstances. No evidence was offered to prove any advances to Sam Cotellesse.

The Legal Ethics Committee of the American Bar Association rendered an opinion, Number 288, on October 11, 1954, to the effect that payments, pending trial in personal injury cases, by an attorney to or for the benefit of his injured client, for any purpose other than to cover expenses of litigation subject to reimbursement, are im-

proper. In reaching this conclusion the committee considered Canon 42 which provides:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

The Committee also considered Canon 10 which provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 refers to expenses which are connected with the litigation such as court costs, depositions and similar expenses. It was the committee's opinion that a lawyer who makes advances to his client for other purposes thereby acquires an interest in the subject matter of the litigation which he is conducting in violation of Canon 10. The committee also observed that the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him in addition to the assurance of performing legal services for the client. In other words, such practice can constitute an indirect form of solicitation. The committee observed that the conclusion which it reached is contrary to the conclusion reached by the Supreme Court of Illinois in the case of *State E. R. Chicago Bar Association v. McCallum,* 341 Ill. 578, 173 N. E. 827. Three of the judges of the Supreme Court of Illinois dissented from the conclusion of the majority. The question was considered by Judge Beamer of the United States District Court for the Northern District of Indiana, Hammond Division, on September 26, 1962, in the case of *El Janny v. Cleveland Tankers, Inc.,* 209 F. Supp. 91. Judge Beamer held that a lawyer was not entitled to an order reimbursing him for monies advanced to his client and stated in the opinion:

> "The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the courts and the organized bar."

He cited and quoted from Opinion 288 of the Committee of the American Bar Association.

While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyers for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.-00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testimony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him.

Conclusion.

It is, therefore, the conclusion of the Board that the Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27.

CHARGE No. 9.

It is charged that Respondent promised to advance money and later did advance money to Andrew Masters during the pendency of Masters' case against the Pennsylvania Railroad. The evidence establishes that there was a discussion between the Respondent and Masters about the advancement of money to Masters at the time Masters first saw Respondent and signed his contract of employment on May 29, 1958 (Respondent's Exhibit 10), and that Respondent advanced monies to Masters on fifteen separate occasions in a total of over $1,200.00 during the period Respondent was representing Masters.

CONCLUSION.

It is the conclusion of the Board that Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 of the Canons of Ethics.

CHARGE No. 10.

It is charged that Respondent is guilty of unprofessional conduct in attempting to influence Elijah Doster in that he endeavored to have Doster sign a false statement that Doster had not been contacted by the Respondent in an effort to have Doster help in the solicitation of the case of Naomi Clark; that at the time Respondent attempted to take said false statement from Doster he paid him the sum of $50.00 in cash. Some of the evidence in support of this charge is discussed in connection with Charge No. 3 pertaining to solicitation by Doster on behalf of the Respondent of Naomi Clark's case. The evidence does establish that on or about July 14, 1961, Respondent prepared an affidavit which Elijah Doster refused to sign until it was corrected, but there is no evidence as to the

contents of such affidavit and, therefore, it cannot be said that the Respondent attempted to have Doster sign a false affidavit. However, the evidence does establish that on the same date Respondent paid $50.00 to Doster and requested him to sign the affidavit, an investigation was being made by a Mr. White of the American Association of Railroads relating to Respondent's activities in suspected solicitation of claims. The payment by Respondent to Doster on that date was obviously for the purpose of influencing Doster as a prospective witness.

Conclusion.

It is the conclusion of the Board that the Respondent was guilty of misconduct in attempting to influence Elijah Doster by the payment of $50.00 to him, in violation of Canon 29 and Canon 32 of the Canons of Professional Ethics.

Charge No. 11.

It is charged that on Christmas Eve, December 24, 1962, the Respondent attempted to intimidate Samuel Doster who was to appear before the hearing panel, by approaching him at Lincoln Knolls Bowling Alley on Route 422 in Youngstown, to prevent him from appearing as a witness by offering him sundry considerations; that the Respondent gave Sam Doster a fifth of whiskey and $5.00 for the purpose of prevailing upon him to prevent his father, Elijah, from appearing as a witness.

The evidence with respect to this charge was reviewed above in connection with the consideration of Charge No. 3 relating to Naomi Clark's claim. The evidence is uncontradicted that the Respondent and Angelo Medura did have a meeting with Samuel Doster on Christmas Eve, December 24, 1962, which was after the Respondent re-

ceived notice of the hearing scheduled by the Panel for December 26, 1962. Respondent said that he merely talked to Sam Doster and asked him to request Sam Doster's father, Elijah, to tell the truth. He denies attempting to influence Sam Doster. It is nevertheless a fact, as testified to by Angelo Medura, that the Respondent did contact Medura for the purpose of having Medura talk to Andrew Masters and that Medura did contact Andrew Masters in connection with the charges pending against Respondent, and that the Respondent was also with Medura for the purpose of talking to Sam Doster. At this meeting Medura did in fact give Sam Doster $5.00 and a bottle of whiskey which was the property of Respondent. While the evidence does not definitely establish that the Respondent was a party to the discussion between Medura and Sam Doster, it is a fact that such discussion took place outside of Respondent's automobile and that Respondent was in the automobile at the time it took place. It is reasonable to infer that whatever discussion took place between Medura and Doster was known to Respondent. Inasmuch as the admitted purpose in seeing Sam Doster was to have him contact his father, Elijah, about his testimony at the hearing before the Panel, it must be concluded that the gifts made to him at this meeting, were for the purpose of influencing him and thereby accomplishing the objective of the meeting. In reaching the conclusion with respect to this charge, the Panel completely disregarded the testimony of Sam Doster given at the original hearing of the Panel in December, 1962, as stated previously in the discussion on Charge No. 3, because this witness recanted that testimony at the hearing held on August 16, 1963 and said that he lied at the December hearing. For the same reason, the Panel disregarded Doster's testimony given at the hearing held on August 16, 1963

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of misconduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

CHARGE No. 12.

It is charged that the Respondent, through one or more of his agents acting on his behalf, did attempt to intimidate the witness, Andrew Masters, on or about Sunday, December 23, 1962, by having his agent offer Masters the sum of $300.00 to keep him from appearing before the Panel as a witness on behalf of the Relator.

Some of the evidence with respect to this charge is discussed above in connection with Charge No. 11. It does appear from the testimony of Andrew Masters that Angelo Medura called Masters on December 23, 1962, and met him and told Masters that "He had an opportunity to get some beer joint, that Mr. Ruffalo was going to back him up * * *"; that Medura further said "You can get $300.00 and you don't have to appear and you're doing me a hell of a big favor." Medura admits talking to Masters on Sunday, December 23, 1962, at Newcastle about Masters' appearance as a witness before the Panel, and that he saw Masters at the Respondent's request. He denied offering Masters any money and explained that Masters was angry with Respondent because Masters was not satisfied with the verdict which had been obtained and because the Respondent did not appeal the case. Medura does admit stating to Masters "Andy, what are you going to gain by going over to Youngstown to hurt this man."

In view of the fact that Medura had contacted Masters at Respondent's and had also talked to Sam Doster in the presence of Respondent about being a witness before

the Panel in the charges against the Respondent, and had admittedly offered Doster inducements not to appear as a witness, the Board concludes that the evidence supports the charge that Medura did offer Masters a consideration to prevent Masters from appearing as a witness against the Respondent.

At the hearing which the Panel held on August 16, 1963, the Respondent called two witnesses, Joseph Edward Petite and Carl R. Foster, who testified that on December 27, 1962, they had gone to the dining room of the Tod Hotel in Youngstown at the request of the Respondent, and taken a table next to that which was occupied by Mr. and Mrs. Masters and a Mr. White, who represented the American Association of Railroads, and that during this conversation Master was overheard telling White that Medura did not offer Masters any money, and that Masters was a friend of Medura's and did not want to hurt him, and White replied that while Masters did not want to hurt Medura he did want to get at Ruffalo, and White told Masters that Masters should go in and testify about being offered $300.00 by Medura. Both of these witnesses admitted that the Respondent had formerly represented them in personal injury cases. They were both employed at the time they gave their testimony. They said they occasionally did work for the Respondent. The Relator objected to the testimony of both of these witnesses concerning the conversations which they allegedly overheard between White and Masters. The objection was sustained for the reason that if the purpose of such testimony was to contradict the testimony given by Masters at the previous hearing, it was necessary to lay a foundation for such contradictory testimony by first asking Masters himself about the alleged conversation between him and White. This was not done, and therefore, the testimony of both of these witnesses was

nothing more than hearsay. *King v. Wicks*, 20 Ohio 88; *Columbus v. Freeze*, 100 O. A. 37, 59 O. O. 474; 56 O. Jur. (2d) 316, Sec. 380.

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of unprofessional conduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.*

EDWARDS, Circuit Judge, dissenting. Respectfully, I dissent from the opinion of this court.

This is a disturbing record on practically all counts. The State of Ohio, acting through its Bar Association and Supreme Court, has disbarred respondent on grounds which will be discussed. The Ohio disbarment is final and is not before us for review.

Dealing with a motion to disbar respondent before the United States District Court for the Northern District of Ohio, the United States District Judge reviewed the same record and held that adequate grounds for disbarring respondent from practice before the federal courts had not been established. *In re Ruffalo*, 249 F. Supp. 432 (N. D. Ohio 1965).

We deal, under our Court Rule 6(3),[1] with a similar petition to disbar respondent in this court. We review the same record.

The respondent was a lawyer in active practice principally representing railroad employees in Federal Em-

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* **Petitioner's Note:** Charges 3, 9, 10, 11 and 12 were found not proved by the Ohio Court; the Court disagreeing with facts as recommended by the Board of Commissioners, 176 O. S. 269.

[1] Rules of United States Court of Appeals for Sixth Circuit (May 1, 1956, as amended April 15, 1966).

ployees Liability Act suits against railroad companies. The Association of American Railroads instigated an investigation of respondent which led directly to the present charges and proceedings.

Most of the testimony adverse to respondent was that of former clients in relation to whose cases respondent had not succeeded in achieving a result satisfactory to them—or for that matter, to him.

The basic charges at the outset were that respondent had engaged in unethical conduct as a lawyer by soliciting lawsuits and employing others to solicit lawsuits for him—in short, what is termed "ambulance chasing."

The State Bar Association panel dismissed seven of fourteen charges and found respondent guilty on the other seven. In its review of the same record the Supreme Court of Ohio, however, found respondent guilty of unethical practices in only two instances. These concerned the making of certain loans to two of respondent's clients and the hiring as an investigator of a person who was also a brakeman for the Baltimore & Ohio Railroad.

In finding the loans made by respondent to be violations of the Canons of Professional Ethics of the American Bar Association (which have been adopted by rule in Ohio), the Ohio Supreme Court relied upon Canon 10, which says: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

The undisputed facts are that out of a very busy practice and after a thorough and thoroughly hostile investigation respondent was shown to have made such loans in two instances.

On June 16, 1957, Mrs. Clara Beighley's husband died as a result of an injury received while working as a conductor for the Baltimore & Ohio Railroad. His widow

employed Ruffalo to represent her in her claim against the B. & O. In the next four years respondent advanced periodic sums of $50 to Mrs. Beighley, which ultimately totaled $1,025.

The other loan pertained to another B. & O. widow. Mrs. Naomi Mae Clark's husband died August 13, 1957, in an accident while employed as an engine house laborer. Mrs. Clark retained respondent on September 3, 1957, and approximately three years later received $21,000 in a settlement with the B. & O. Meantime, respondent had made periodic advances to her which totaled $611 at the time of settlement.

I cannot in good conscience agree that the making of such small loans as these to two admittedly impoverished widows represented purchasing an interest in litigation. If this record showed that making maintenance loans to clients was a general practice employed by respondent so as to become widely known and hence to constitute an economic attraction for potential clients, we would have facts from which such an inference properly could be drawn. Clearly we do not have such proofs in this record.

We recognize, of course, that the American Bar Association's Professional Ethics Committee has published an opinion, No. 288, (41 A. B. A. Journal 33 (Jan. 1955)) which may be cited as general support for the view expressed by the Ohio Supreme Court. This view is, however, against the great weight of opinion in the courts in this country. *People ex rel. Chicago Bar Association v. McCallum,* 341 Ill. 578, 173 N. E. 827 (1930); *Johnson v. Great Northern Ry. Co.,* 128 Minn. 365, 151 N. W. 125 (1915); *Hildebrand v. State Bar of California,* 18 Cal. 2d 816, 117 P. 2d 860 (1941); *In re Moore,* 8 Ill. 2d 373, 134 N. E. 2d 324 (1956); *In re Sizer,* 306 Mo. 356, 267 S. W. 922 (1924); *Bank of Chenango v. Hyde,* 4 Cow.

567 (N. Y. 1825); see also *Grievance Committee of Fairfield County Bar v. Nevas*, 139 Conn. 660, 96 A. 2d 802 (1963); *State ex rel. Florida Bar Association v. Dawson*, 111 So. 2d 427 (1959). We likewise feel that it is a view which is basically inconsistent with the attitude toward legal representation in FELA cases expressed by the Supreme Court of the United States in *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

The view of the Illinois Supreme Court adopted in *McCallum* in my opinion expresses the majority view in this country on this issue:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a cause where without such aid he would be unable to enforce a just claim. *Christie v. Sawyer*, 44 N. H. 298; *Shapley v. Bellows*, 4 N. H. 355. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of

the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered. *Johnson v. Great Northern Railway Co.*, 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140; *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999. By canon 42 of the Ethics of the American Bar Association, it is permissible for an attorney to advance costs and court charges for his client, with the understanding that the same are to be ultimately paid by the client." *People, ex rel. Chicago Bar Association v. McCallum, supra,* at 589.

I turn now to the second issue in this case. Respondent employed one Orlando, whose regular occupation was that of a brakeman on the B. & O. Railroad. He worked on a night shift. Respondent testified that Orlando's employment with him was that of an investigator of FELA cases brought by respondents against railroads, including Orlando's employer.

I note that Orlando's work involved no supervisory responsibilities to his employer and no access to records, confidential or otherwise, which would have assisted him in his daytime job with respondent.

But discounting these factors as much as I do, I cannot avoid concluding that Orlando's access to the B. & O.'s property and personnel would be of potential value to respondent and that it would some times be impossible (probably even for Orlando) to know when Orlando was working for the railroad and when he was investigating for respondent.

I believe the day is long gone when a railroad so owned its employees' souls that it should be held impermissible for one of its brakemen to accept outside em-

ployment on his own time (even as an investigator of lawsuits against another railroad). But the employment of a railroad employee to investigate accident claims against his own employer opens a tempting door to industrial spying which no person of ordinary conscience should be asked to go by every normal work day.

Respondent's actions in hiring Orlando for the purposes admitted by respondent, in concealing the employment relationship and in being a great deal less than fully cooperative with the Bar Association's investigation of his record in this matter convince the majority that he was aware of the conflict of interest inevitable (for Orlando!) in his hiring Orlando to investigate accident cases against Orlando's own employer. These facts also convince me.

This, however, does not end the matter. In order for a lawyer properly to be found guilty of an offense and barred, perhaps forever, from the practice of his profession, he should have advance notice that the act he was charged with was an offense, and prior to his hearing he should have written notice of the charge made against him. Respondent here had neither.

The charge we deal with here was numbered 13 and it was added by oral motion at page 662 of this 1034 page transcript over respondent's strong objection. Such procedural violation of due process would never pass muster in any normal civil or criminal litigation. Nor should it here. *Selling v. Radford*, 243 U. S. 46 (1917).

Even more to the point, the Ohio Bar Association and the Ohio State Supreme Court were unable to cite any canon of ethics which purported to forbid respondent's conduct in hiring Orlando. Neither do my colleagues. Nor is any prior ethics opinion or case precedent cited for the holding here.

Under the circumstances, I would think that the course of action taken by the Illinois Supreme Court in *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 398, 150 N. E. 2d 163, 168 (1958), was an appropriate one to follow. In declaring a representation plan (previously approved by another court) to be improper, the Supreme Court then held that "proceedings looking toward the imposition of discipline should not be pursued. * * *" in that case.

There is an ancient adage, "Where there is smoke there is fire." If this were a governing rule of law, I would quickly have agreed with my brethren's result in this case. This record surely contains a great deal of smoke. The writer confesses that he, too, is capable of being impressed thereby.

Finding myself, however, in fundamental disagreement with relying for disbarment on the issues dealt with above, I undertook research of the record for a possible concurring opinion which I thought would be founded upon the ambulance chasing and witness tampering findings of the Ohio State Bar. To abbreviate a lengthy recital and weighing of a record of over 1,000 pages of transcript, I note that I simply could not find reliable evidence upon which to approve these findings. I deduce that my colleagues cannot do so either. Yet they include as an appendix these same findings upon which neither they nor the Ohio Supreme Court saw fit to rely.

For the reasons I have indicated above, I feel there are "grave reasons" why this court should agree with the United States District Judge in declining to accept the judgment of disbarment of the Supreme Court of Ohio.

APPENDIX D.

SECOND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT.

BATTISTI, *J.*:

In a memorandum opinion dated October 4, 1965, this Court found that Respondent John Ruffalo, Jr., had shown cause why he should not be disbarred from practice before the United States District Court for the Northern District of Ohio. *In re Ruffalo,* 249 F. Supp. 432 (N. D. Ohio, E. Div., 1965). In the same opinion the Court made the following observation:

> "At the present time disbarment proceedings against the Respondent are pending in the Sixth Circuit Court of Appeals. Since the issues raised in the Sixth Circuit Court of Appeals are identical to those raised here, a final order will be deferred pending a decision by that Court. In the meantime, an order will be entered restoring Respondent to practice before this Court. In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings. Otherwise, a final order will be entered consistent with conclusions reached in this memorandum opinion."

On December 29, 1966, the Sixth Circuit Court of Appeals, in a two to one decision, concluded:

> "This is an original proceeding in this Court. We are not reviewing the ruling by the District Court. Respectful of the careful consideration of the matter by the District Judge, we advise our disagreement with his conclusions. While not controlling, we think it proper to observe that it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state.

"The name of John Ruffalo, Jr., is hereby stricken from the roll of counsel permitted to practice before this Court. This discipline shall remain in force until further order of this Court."

In view of the opinion of the United States Court of Appeals for the Sixth Circuit, the findings and conclusions of October 4, 1965, have been reconsidered.

At the outset, and in all candor, it should be noted that this Court has an abiding conviction that the findings and conclusions of October 4, 1965, are correct. While, technically, there may be no absolute obligation to follow the decision of the Court of Appeals, other considerations dictate that the findings and conclusions of October 4, 1965, be vacated. Foremost among them is a deep conviction that the orderly and effective administration of justice compels a district court to faithfully respect and defer to the opinions of its circuit court of appeals. Thus, an order will be entered suspending John Ruffalo, Jr., from practice before the United States District Court for the Northern District of Ohio until further order of this Court.

/s/ FRANK J. BATTISTI,
United States District Judge.

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APPENDIX VOL. II.

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF JOHN RUFFALO, JR.,

Petitioner.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

Petition for Certiorari Filed March 24, 1967.

Certiorari Granted October 9, 1967.

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TESTIMONY FROM THE TRANSCRIPT OF THE HEARING BEFORE THE BOARD OF COMMISSIONERS.

E. 1. Testimony of John Ruffalo, Jr.

(3)

Hearing Held, Beginning Wednesday, December 26, 1962.

BEFORE THE PANEL OF THE BOARD OF COMMISSIONERS:

C. R. BEIRNE, ESQ., Cincinnati, Ohio, Chairman;
JUDGE HENRY MIDDLETON, ESQ., Toledo, Ohio; and
BRUCE BIERCE, ESQ., Akron, Ohio, Members.

(3a)

APPEARANCES:

On Behalf of the Relator, The Mahoning County Bar Association:

DAVID C. HAYNES, ESQ., Youngstown, Ohio;
COMUS M. BEARD, ESQ., Youngstown, Ohio;
ARSENY A. MELNICK, ESQ., Youngstown, Ohio;
CHARLES P. HENDERSON, ESQ., Youngstown, Ohio, President of the Mahoning County Bar Association; and
PETER P. MICHAELS, ESQ., Youngstown, Ohio, Secretary of the Mahoning County Bar Association.

On Behalf of the Respondent, John Ruffalo, Jr., Attorney At Law:

JOHN RUFFALO, JR., ESQ., Youngstown, Ohio.
FERDINAND R. MONTANI, ESQ., Youngstown, Ohio.

* * * * *

(6) Chairman Beirne: Now, who will conduct the examination in this?

Mr. Haynes: Mr. Beard and I. That is, Beard and Haynes. I am Haynes.

Chairman Beirne: All right, sir.

Mr. Ruffalo: My name is John Ruffalo, and this is my co-counsel, Mr. Ferdinand R. Montani.

* * * * *

(12) Chairman Beirne: We are ready to go ahead and proceed on the hearing of the merits. Now, may I inquire, Mr. Ruffalo, what your wishes are with respect to whether this should be a private or (13) a public hearing? Under Rule XXVII you have the right to ask for a public hearing or you have the right to ask for a private hearing. If you don't request either, it will be a private hearing. That is up to you.

Mr. Ruffalo: Well, I would just as soon have it a private hearing.

Chairman Beirne: All right, sir.

* * * * *

(24)

Whereupon the Relator next called MR. JOHN RUFFALO, Attorney at Law, for cross-examination, and the witness, being first duly sworn, testified as follows:

CROSS EXAMINATION OF MR. RUFFALO by Mr. Haynes.

Q. Your full name is John Ruffalo, Jr.? A. John Ruffalo, yes.

Q. How old a man are you, Mr. Ruffalo? A. I am 49 years of age.

Q. Forty-nine. When were you admitted to the Ohio Bar? A. August of 1946.

Q. So you have been practicing a matter of 16 years? A. Yes, just about.

Q. And your father before you was John Ruffalo? A. John Ruffalo.

Q. When did he pass away? A. My father died February the 3rd, 1953.

Q. '53. Now, are you admitted in any other states, other than the State of Ohio, in the practice of law? A. No, I am admitted to the practice of law in the State of Ohio only.

* * * * *

(26) Q. You are acquainted with Michael Orlando? (27) A. Yes.

Q. How long have you known Mike Orlando of New Castle? A. Oh, I have known Mike for a number of years.

Q. Did you bring with you, sir, what I subpoenaed, any payments made by you to Mike Orlando for the last number of years? A. No, I have no—I have no record of receipts of pay, of payments. Mike Orlando has worked for me as an investigator, and I paid him out of a fund that I have in the office through the investigation department.

Q. Mike Orlando, you now say, worked as an investigator. Is it not a fact you had him as a solicitor to solicit personal injury cases for you for a number of years preceding the time which we are here about? A. No, Mike Orlando was not hired by me to solicit any cases.

* * * * *

(36) A. The first time I ever learned about the fact I was up for another disbarment was sometime later that year.

Q. What year? (37) A. Either later—the latter part of '61 or the first part of '62 is when I first learned about it.

* * * * *

(39) Q. All right. Let's talk a little bit about this fellow, Mike Orlando. He is the fellow that worked for the B. & O. Railroad, isn't he? A. That's right.

Q. He is the fellow that went up and was discharged by the B. & O. Railroad after a hearing before the National Labor Relations Board, or whatever it is that takes care

of that; did you represent him at that hearing? A. Well, I did not—he did not go to a hearing.

Q. All right. Now, then, he was charged with being an unfaithful employee. * * * A. He was not discharged.

Q. They had the hearing up there in Akron, as you well know, Mr. Ruffalo, didn't they, and he never appeared, and the case has been kept open for a year and a half for him to make a defense, which he has never made; you know that, don't you? A. Yes.

Q. Yes. A. But he is not discharged.

Q. He is not receiving pay from them, is he? A. He is not receiving pay from them, but he is not discharged.

* * * * *

(40) Q. When was his hearing had in Akron? A. Oh, I think sometime in July of '61.

Q. '61. And you know of your own knowledge that today he has never made an appearance there to contest those charges, has he? A. That he will.

Q. But he hasn't to this day, has he? A. But he will.

* * * * *

(41) Q. You do not have within your possession any record of payments of any kind that you made at any time for the period called for to Mike Orlando, Michael Orlando? (42) A. No.

Q. You don't have any? A. I made these payments, and they—

Q. Do you have receipts for cash advanced to him? A. I—I have no receipts. We did it particularly on a word basis.

Q. Then how did you account for them in your Income Tax statement? A. Well, we—

Q. It was charged as a business expense, wasn't it? A. It would be charged as a business expense, yes.

Q. How did you charge it off as a business expense if you don't have any records of any kind pertaining to it? A. Because we would have—keep the total amounts, and at the end of the year we would make our debits on the record, and then the Internal Revenue would check it, and then we would give it over—

Q. Now, Mr. Ruffalo, will you bring over your books, then, which will reveal these payments to him? A. They won't be shown by any books, because they were made by cash.

Q. Now, you are Mike Orlando's lawyer; aren't you one of them? A. Well, I don't know whether—

Q. How would you advise a client, then, if no record is ever (43) kept of the payments of the payer to the payee? A. Well, we kept it that way for the particular fact that he was working for the B. & O. Railroad, and we didn't want to get him involved with the B. & O. Railroad.

* * * * *

Q. Now, then, Mr. Ruffalo, I want some kind of a record for this Panel here to show payments made by you to Mike Orlando. Now, what do you have? (44) A. I don't have—I told you these things were made on a cash basis. The records were mainly kept there that way, and as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike—

Q. Were you checked by the Internal Revenue? A. Yes.

Q. Who checked you? A. Oh, I don't know. Two or three of the different men.

Q. Tell us the names of the men who checked you from Wick Avenue, because I want to call them in here, Mr. Ruffalo, and I am going to do it. Now, you had better

give us the names. A. You've got no right to go into my Income Tax records or anything else.

Q. Well, we are going to try to do it, either one thing or the other. Either it is that or you give us the names and the amounts and the times that you paid Mike Orlando. A. I can't give you the time. I can give you the lump amount.

Q. Give us the amount. You naturally have an entry in your ledger as to when you gave it? A. I have no entry in my ledger as to when I gave it.

Q. Well, how do you keep books; don't you keep track of every penny that you pay out in the operation of your law office? (45) A. Certainly.

Q. All right. How much did you pay Mike Orlando for last year, '61? A. '61?

Q. Yes. A. I can't tell you that.

Q. How much did you pay him in '60? A. Oh, I don't—

Q. But you took it as a deductible expense on your Income Tax? A. Absolutely, yes.

Q. How much did you pay him, then? A. I can't tell you offhand, unless I would check my record book.

Q. Well, then, will you have the records over here? A. I will bring the amounts over to you.

Q. I want the books so we can have the time. A. Well, you can have the books if you want to, but you will find nothing in the books on it.

Q. Mike Orlando's name doesn't appear? A. No.

Q. Is that right? A. That's right.

Q. Now, tell us, Mr. Ruffalo, why doesn't Mike Orlando's name appear in there— (46) A. Because he wasn't—

Q. —as having received wages from you? A. Because he was an employee of the B. & O. Railroad.

Q. Because he was a B. & O. Railroad employee? A. And we didn't want it to be known that he was doing investigating work.

Q. In other words, Mr. Orlando did procure some cases for you— A. He did not procure.

Q. —against the B. & O.? A. He did not procure cases.

Q. He did not? A. He investigated cases for me; he did not procure them.

Q. And you paid him for it? A. I paid him for it, yes, for the investigation.

Q. And you don't have a record in your books to show how much or when? A. No, because the money would be drawn to cash.

Q. Drawn to cash. It would be by check, then? A. It would be drawn to me. I would draw the money out and keep a fund in the office and pay him—

Q. Mr. Ruffalo, why did you take such a circuitous route simply to pay an investigator out of your office? A. Because we didn't want it to be known, in case any question came out about it, that he was a B. & O. employee (47) who was doing investigating work for me.

Q. How do you pay Frank Guthrie? A. I pay him by check.

Q. As an investigator? A. He hasn't done much investigating for me—

Q. But you pay him by check? A. I pay him by check.

Q. And his name appears, and he endorses the check? A. But he isn't an employee of the B. & O. Railroad; he is an office manager and—

Q. Let us put it this way: Let us put it this way, then: Mike Orlando hasn't been an employee of the B. & O. Railroad for better than a year and a half, has he? A. That's right.

Q. You have paid him money in that interim? A. I have not.

Q. You have not? You haven't paid him a dime since he was discharged by the B. & O. in Akron? A. (Shaking head.)

Q. You mean that? A. No, I haven't.

Q. But you haven't any means at your disposal to show these three Commissioners here when or how much you paid Mike Orlando for his investigative services? A. I can show you the lump sum amounts; I can bring that (48) over and tell you exactly.

Q. What was the lump sum amount? A. Well, I can't tell you offhand. I mean some years he might make fifteen hundred dollars, some years he might make twenty-five hundred dollars, some years it might be thirty-five hundred dollars, but I can't tell you—it was paid to him on a work day basis.

Q. Let's go down a few of these New Castle cases, Mr. Ruffalo. Clyde E. Beighley, did he investigate for that case? That occurred, or the date of settlement was May 4, '61. A. Yes, sir.

Q. These are all New Castle cases in here. A. Yes, he did.

Q. But you are not an Ohio lawyer; you are not admitted to practice in New Castle, are you, or in Pennsylvania? A. No. I practice in Federal Court in Pittsburgh and have tried a number of cases in Federal Court in Pittsburgh. I have been down in the United States Circuit Court of Appeals in Philadelphia on two or three cases.

Q. Let's go down and see if you remember these cases. Clyde E. Beighley, New Castle, settlement date, May 4, '61. Do you remember that one? A. Yes, I do.

Q. Clifford Bishop, New Castle, settlement date, 4-20-61. Do you remember that one?

* * * * *

(50) A. Yes.

Q. Elijah Doster, New Castle, 2-4-60? A. Yes.

Q. Right? A. Well, the dates—I know the names; I can't tell you the dates.

Q. Well, we will eliminate the dates, because you have my word for them, that they are all subsequent to '53, and if you want to see this (indicating), you may see it. A. All right.

* * * * *

[Here follows a listing of twenty-eight claims, by the name of the plaintiff only.]

* * * * *

(53) Q. Mike Orlando; he has one pending against the Erie Railroad, hasn't he? A. No, he doesn't.

Q. Did you settle that one? A. The case has been tried and over with.

Q. When was it settled and disposed of? A. Oh, sometime around about the first part of this year.

Q. And you settled or tried that one? A. I tried it.

Q. And there was a verdict for him? A. Yes.

Q. Down at Pittsburgh? A. Down at Pittsburgh.

Q. That was for Mike Orlando? A. Yes.

Q. Joel J. Scalzo? A. Still pending.

Q. Still pending. Is that the B. & O.? A. Yes.

Q. Michael Shenker? A. That's still pending in the United States District Court.

* * * * *

(54) Q. What do you call this, all of these cases? A. What do you mean?

Q. Did they all come to you voluntarily? A. Those are under the F.E.L.A.

Q. Did they come to you voluntarily? A. Yes.

Q. Every one of those I have gone over? A. Yes.

Q. They walked into your office in the Mahoning Bank Building in Youngstown? A. Yes; they either came over or they called me.

Q. And you went over? A. Yes.

Chairman Beirne: Are these all in New Castle?

Mr. Haynes: Yes.

The Witness: You've got to remember some of these cases were my father's cases and they came into the office when my father was alive.

Q. Your father died in '53? A. My father died in '53, yes.

Q. And all these cases had happened subsequent to his death? A. No, they didn't. They did not.

* * * * *

Hearing Dec. 27, 1962. Same Appearances. Afternoon Session.

(412) Chairman Beirne: I might say we always take prior records under consideration in the event we find that the respondent in any case has been guilty of any other charges, not for the purpose of determining the guilt or innocence of the respondent—

Mr. Haynes: That's right.

Chairman Beirne: —but for the purpose of determining what recommendation should be made as to disciplinary action. There has always been a doubt in my mind as to the propriety of taking into consideration, in the primary consideration of guilt or innocence, the disposition of some prior charge.

* * * * *

(418) Mr. Haynes: Now, I asked Mr. Ruffalo pertaining to various transactions, including specifically one, Michael Orlando, to bring over his ledger sheets or what-

ever he had to show payment, whether it be to him or from that account. I would like at this time to see those records.

Mr. Ruffalo: I haven't been able to get them together or bring them over here, but I will have them for you.

Mr. Haynes: I want them before I rest, and actually, Mr. Ruffalo, I subpoenaed those.

Mr. Ruffalo: I told you I had no records in regards to Mr. Orlando.

Mr. Haynes: All right. Are you making a statement to this Panel, and may we stipulate that you have no financial statements or figures which will back up payment of any kind to Michael Orlando? Is that what you are telling this Panel?

Mr. Ruffalo: I am telling you that is so, except what we have recorded—

Mr. Haynes: All right.

Chairman Beirne: Wait until we see what he says.

Mr. Ruffalo: I have no checks or receipts or nothing that bears anything in writing in any ledgers or anything else referring to Mike Orlando.

(419) Chairman Beirne: What was it you were going to say, that you were going to look for something? What were you referring to?

Mr. Ruffalo: The only thing I could find that would possibly bear on it, if I could find them, would be evidence of what he reported on his income tax or—what he reported on his income tax.

Chairman Beirne: That is what you reported or what Orlando reported?

Mr. Ruffalo: What he reported.

Chairman Beirne: In other words, you were anticipating to ask Orlando to produce copies of his income tax records?

Mr. Ruffalo: No. I think I can find evidence over there as to what was sent in in order for him to pay his income tax.

Chairman Beirne: A statement or a report of the payments you made to him?

Mr. Ruffalo: Yes.

Chairman Beirne: A report to the Internal Revenue; is that what you are referring to?

Mr. Ruffalo: Yes, either mine or his.

Judge Middleton: You would send a report in of your own of what you paid him as it was earned? You would send those in to the Internal Revenue?

(420) Mr. Ruffalo: Yes.

Mr. Bierce: What did you base it on? That is really getting down to the crux of the thing. Where did you get your figures that you sent to the Government of the money you paid him?

Mr. Ruffalo: I got them on the basis of what I would pay him.

Mr. Bierce: But you don't keep that in your ledger. Where do you keep it?

Mr. Ruffalo: Well, we keep a record of it.

Mr. Bierce: What is your record? Do you keep a record of it?

Mr. Ruffalo: I would only keep a record of the total amount I paid him. That was all.

Chairman Beirne: What kind of a record is that?

Mr. Ruffalo: That would be the tax record that I would send in at the end of the year.

Mr. Haynes: That is what I want.

Chairman Beirne: The tax return?

Mr. Ruffalo: That would be a tax return, a little slip.

Chairman Beirne: The employers' report of payments to the employee?

Mr. Ruffalo: Yes.

Mr. Bierce: But where did you keep the record? (421) You didn't pay it in one lump sum at the end of the year; you paid him some as you went along?

Mr. Ruffalo: I paid him some as we went along.

Mr. Bierce: All right. Where did you keep the record of those payments?

Mr. Ruffalo: He would present me with the amount and keep the record himself.

Mr. Bierce: And you would never keep a record?

Mr. Ruffalo: We worked on our word and on our own particular honesty and the understanding that we had, and that is the way we worked.

Mr. Bierce: Did you do that intentionally?

Mr. Ruffalo: That was done because of the fact that he worked for the B. & O. Railroad, yes, and we didn't want anything coming up that might crop up as a result of being or becoming—that is, to the company, of being directed to the question of the company finding out about it, because it might have had some consequences in regard to his job, and that is why it was done. It wasn't done for any other reason.

Mr. Bierce: You say at the end of the year he would tell you a certain figure as being the amount that you would pay, and you would, as you say, make out the report (422) to the Internal Revenue that you had paid so and so, so many dollars during the year. How do you know the figure he gave you was correct?

Mr. Ruffalo: He would keep a record of it.

Mr. Bierce: I know, but how did you know it was correct? You are the one who was certifying that you paid that.

Mr. Ruffalo: He would show me this record he had, and each time he would show me that record I would pay

what he had there, and we would come to an accounting at that time, and I told him at the end of the year, "We are going to have to pay income tax on this thing, and I am going to have to submit so much, and you keep the record."

Mr. Bierce: All right. Let me ask you this: You take in so many dollars a year; I mean your income is something you have got to keep a record of. Now, then, your income, the amount you get, you have to keep a record of it, and that means you have got to show where the rest of it went when you return these amounts as income on your tax return, and the amount that you took in, the gross amount. Now, then, how can you substantiate those payments if you don't keep a record of it?

Mr. Ruffalo: I keep only the record that he would have, and if there was any question about it, I would get that from him and show it to the Internal Revenue (423) Department, and, if necessary, I would get an affidavit or whatever we needed in order to prove it. It has never been questioned. The Internal Revenue people have said, "Well, we can understand why you do not want this shown."

Judge Middleton: Are you audited every year by the Revenue?

Mr. Ruffalo: Yes, I am. Mr. Orlando's income tax return, in so far as I know—and I have seen some of them in the past years—he has listed that as an investigation, and every item is put down there and everything is itemized on that particular return.

* * * * *

(427) Mr. Haynes: Now, once again I would like to see this W-2 Form, or whatever it is that Mr. Ruffalo does submit on behalf of this man Orlando. I want this subpoena obeyed for the records that I subpoenaed per-

taining to the records of Mike Orlando. There must be some record of some kind somewhere that he has, just as Mr. Bierce was asking about. Now, I want it, your Honors, and we need it.

Chairman Beirne: Now, Mr. Ruffalo, I think we ought to see the records that you have, whether they show this or whether they don't show it, whatever records you have pertaining to your income and expenses during the years we are concerned with, which would be in nineteen—what time is Orlando's—

Mr. Haynes: I subpoenaed them, I think, from '56 up to date.

Chairman Beirne: Now, whether they have the name, Orlando, in them or whether they don't have, I think the records ought to be produced so that an examination of them can be made before this matter is concluded, any records that you may have that may relate to this particular question.

Judge Middleton: And if you don't keep records yourself but you adopt the records which Orlando keeps and (428) make them your own, then that is included in this demand, because those become your records, if you simply adopt Orlando's records and say, "I put the figures in from his records."

Mr. Haynes: Now, I am not going to rest my case until I get what I subpoenaed, and I subpoenaed them sufficiently well ahead of time. I subpoenaed them for the December 10th hearing, and I likewise subpoenaed them for this hearing, and now he has had ample time to produce what I want.

Chairman Beirne: Yes. You will produce the records, Mr. Ruffalo?

Mr. Ruffalo: I will produce the records. It will take an hour or an hour and a half.

Chairman Beirne: That is something you can do tonight, since we will not have a night session.

Mr. Ruffalo: I will have them tomorrow.

* * * * *

(429) Mr. Haynes: Now, then, so there will be no misunderstanding, if you can't find anything as respects the Orlando payments, then I want you to bring your own income tax payments for the same period of time, for the time in question.

Mr. Ruffalo: Well, I—

Mr. Haynes: Now, you can keep them secret; I am not interested in knowing how much you made, but I want to know the amount you paid your employees, as reflected on your financial statements.

Mr. Ruffalo: To my employees or Mike Orlando?

Mr. Haynes: All right, Mike Orlando. The income tax statement is what I want.

Mr. Ruffalo: You will have them. If I can't get them otherwise, I will show you, in so far as my income tax records reflect.

Chairman Beirne: All right. That is understood, then.

Mr. Haynes: Then I will not rest until such time as that is in the record.

* * * * *

Chairman Beirne: Now, I think we are ready for (430) the evidence on behalf of the Respondent.

* * * * *

Friday, Dec. 28, 1962. Hearing resumed. Same appearances.

(585) Chairman Beirne: Gentlemen, we may have misled counsel for both parties by a statement to the effect that we would consider Charge No. 1 as establishing a course of conduct. You may have implied from that re-

mark that we would take that finding of the Court into consideration in determining the guilt or innocence of the Respondent in the other charges.

Now, we are not going to do that. Charge No. 1 will be considered only in the event the evidence supports any one or more of the other charges in the complaint and we find that there has been a violation of one or more of the canons because of that evidence in support of those charges. If that occurs, we would then consider Charge No. 1 in making our recommendation to the Board as to what disciplinary action should be taken, but it would not be considered by us for any other purpose. Therefore, if the evidence in our opinion fails to support any of the charges after No. 1, No. 1 would have (586) no probative effect whatever.

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(595) Mr. Haynes: Now, maybe we can expedite things if Mr. Beard and Mr. Melnick here could check the records Mr. Ruffalo brought with him this morning that we said we wanted to check, and they could be looking at them while we are proceeding.

Chairman Beirne: Will you do that, Mr. Ruffalo? They can check them while we are proceeding.

Mr. Ruffalo: I don't have them.

Mr. Haynes: Didn't we have an understanding he was to bring records in here, that if he didn't have a ledger sheet, he was to bring some record to show payment, his income tax statement, that I didn't want to know the (596) amount of income, but—

Mr. Ruffalo: Well, I—

Mr. Haynes: Let me finish. —to show exactly how much was paid to this man?

Chairman Beirne: Well, I think I was in on that myself.

Mr. Haynes: I think we did, yes.

Chairman Beirne: I asked for all of the records you would have, Mr. Ruffalo, over the period of time we are concerned with in this case, regardless of what you said they might show, so that they would be available to Counsel for the Relator to determine for themselves, not on the basis of what you said, but for themselves from the record here what your expenses were, in an effort to establish as to how payments were made to Orlando.

Mr. Ruffalo: These are the ones right here (indicating). These are the withholding statements over the period of time.

Chairman Beirne: My request was that you, in addition to those, bring your records of income and expenses, your office records. I think you understood that.

Mr. Ruffalo: I told you I had no records that indicated any payments to Mr. Orlando.

Chairman Beirne: You don't understand me. I didn't ask for that. I said to clear the matter up and to (597) avoid the bickering, if there was any, I suggested that you bring in all the records which you have relating to your financial transactions over the period of time we are concerned with, so that your records could be inspected by counsel for the Relator to determine, if they could, what payments if any had been made by you to Orlando. Now, I think I made that perfectly clear. I wasn't in any way limiting this. It was about as broad as you could get it.

Mr. Ruffalo: The subpoena said, sir, only to bring in the records—

Chairman Beirne: This was not related to the subpoena. This was a request by me as chairman of the panel.

Mr. Ruffalo: I don't think they should have a right

to just go down through my ledger and look at everything that is in my ledger.

Chairman Beirne: This doesn't involve the question of whether they have the right. This was a question of whether you would produce these for the Panel of the Board of Commissioners of the Supreme Court.

Mr. Ruffalo: I wish to object to it strongly. I think it is entirely improper. The only thing they are interested in here is the question of fact of whether I paid anything to Orlando. I have the slips here showing what I did pay.

(598) Chairman Beirne: I take it it is your position you refuse to produce the records I requested yesterday?

Mr. Ruffalo: No, I do not refuse to produce them, but it is entirely irrelevant. I have the records here to establish my payments, and just to go through my records here to find out what they can find of any kind of a nature that they might try to throw against me here in this thing and to amend their complaint on what I did here, I don't think they should do that.

Chairman Beirne: The point apparently you don't understand is, they are not bound by what you say the records do not contain. They may examine the records themselves to determine what those records contain. Now, you have said to this Panel that there have been payments varying from $1500 to $3500 to Orlando in different years.

Mr. Ruffalo: That's right.

Chairman Beirne: And the point at issue was that there must be some record of those payments. You said that Orlando had those records, and you said that the only records you had were these withholding statements.

Mr. Ruffalo: That's right.

Chairman Beirne: And then the point was pursued by Mr. Haynes that there must be some record of yours that you would have to show that. You said that there

was none. Now, it was my conclusion that they should have the right (599) themselves to look at your records to determine that and should not be foreclosed merely because you say the records won't show anything.

Mr. Ruffalo: The subpoena says I bring in the records of Mike Orlando.

Chairman Beirne: I won't comment on it any more. I think I made it clear.

Mr. Haynes: Mr. Beirne, here (indicating) is what I subpoenaed on two occasions: For the prior hearing and for this hearing.

(At this point there was a conference at the Bench out of the hearing of the reporter.)

Mr. Haynes: Judge, I believe I would like what you are asking stated for the record.

Chairman Beirne: I asked Mr. Ruffalo whether he had cancelled checks covered by these payments. Checks are mentioned in the subpoena.

Mr. Haynes: And what was Mr. Ruffalo's answer?

Chairman Beirne: What was your answer, for the record?

Mr. Ruffalo: My answer was: No.

Chairman Beirne: Just to clarify the record, then, I do think the record should show the papers have been produced, Mr. Haynes.

(600) Mr. Haynes: May I see them?

Chairman Beirne: And if it is agreeable to Counsel, I will just read them into the record.

Mr. Haynes: I would like to see them.

Judge Middleton: Those records have been produced. It doesn't mean all the records have been produced that were covered by the subpoena.

Mr. Haynes: Then I think we are entitled to the others, in addition. Now, what I want, in addition to this,

as I have said there, are the various items that would appear on the ledger for the kind of work done, the dates it was done, and the amounts, not these accumulated amounts. These don't mean anything as far as the record is concerned.

Chairman Beirne: Well, as far as they go, I would like to have the record reflect it.

Mr. Haynes: Yes, as far as they go.

Judge Middleton: What is the form number on it, W-2?

Mr. Haynes: This is Form 1099, '58, '59—well, here, your Honors, it is obvious there is something wrong with one. There are two for '59, and here "1959" is x'd out and "1957" was put in. Now, that could be done on a person's own typewriter.

Mr. Ruffalo: It was not done by any person's (601) typewriter.

Mr. Haynes: I am speaking to the gentlemen at the Bar here.

Mr. Ruffalo: That was done because of the fact that at the time I had a girl in the office who didn't know how to make out those slips. The Internal Revenue checked my books and found out they weren't made. I had to take them out and resubmit them to them and pay a dollar penalty for the ones I didn't submit, and that is perfectly in order with the Income Tax, Internal Revenue Department.

Chairman Beirne: Let's read them into the record.

Judge Middleton: That one, then, should be considered as '57?

Mr. Ruffalo: '57.

Mr. Haynes: And they will be identified and held here, too.

Chairman Beirne: Yes.

(Relator's Exhibits 7-A, 7-B, 7-C, 7-D, and 7-E marked for identification.)

Mr. Beard: Attorney Ruffalo, the Respondent in this case, has produced the United States Information Return for the calendar year, 1957, Form 1099, showing payment to Michael Orlando of 315 West Wabash Avenue, New Castle, Pennsylvania, and showing that he made a payment to him in the year 1957 of $2,950, which is (602) Relator's Exhibit 7-A.

Exhibit 7-B is Form 1099, United States Information Return for the calendar year 1958. To whom paid: Michael Orlando, 315 West Wabash Avenue, New Castle, Pennsylvania, $1,250. That is Exhibit 7-B.

7-C is Form 1099, United States Information Return for calendar year 1959. To whom paid: Michael Orlando, 315 West Wabash Avenue, New Castle, Pennsylvania, $1,273.37.

Chairman Beirne: Give me that again.

Mr. Beard: $1,273.37. That is the year 1959.

Exhibit 7-D: The year 1960, Form 1099, United States Information Return for calendar year 1960, paid to Michael Orlando, 315 West Wabash Avenue, New Castle, Pennsylvania, $3,829.25.

Form No. 1099, United States Information Return for calendar year 1961. To whom paid: Michael Orlando, 315 West Wabash Avenue, New Castle, Pennsylvania; the amount is $4,716. That is Exhibit 7-E.

Each of these exhibits show that these amounts were paid by John Ruffalo, Jr., 510 Mahoning Bank Building, Youngstown 3, Ohio.

Mr. Haynes: Mr. Ruffalo, you received a subpoena duces tecum by Mr. Bilger prior to when this hearing was set for December 10th, and you likewise received (603) another for this hearing, did you not?

Mr. Ruffalo: I didn't receive the first one.

Mr. Haynes: Well, then, you did receive the second one?

Mr. Ruffalo: They put the second one in my office door.

Mr. Haynes: Well, you received the subpoena duces tecum, and you knew what we were asking for in that; is that correct?

Mr. Ruffalo: Right.

Mr. Haynes: Yes.

Mr. Ruffalo: The second one was—

Mr. Haynes: Is this (indicating) an exact copy of the one you received?

Mr. Ruffalo: I would assume that it is, yes.

Mr. Haynes: Then I want to mark this as Relator's Exhibit 8.

* * * * *

Exhibit 8: Subpoena Duces Tecum.

To: John Ruffalo
510 Mahoning Bank Building
Youngstown, Ohio

You are hereby required to be and appear before The Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio at the Court of Appeals Courtroom, 4th floor, Courthouse, Youngstown, Ohio on the 26th day of December, 1962 at 1:30 o'clock P.M. to testify in a certain matter pending before said Board and also that you bring with you and produce at the time and place aforesaid all of your records, checks, disbursements, and receipts of any kind or nature, showing payments to one Michael Orlando of New Castle, Pennsylvania, for the years 1957, 1958, 1959, 1960, 1961, and 1962.

(697)

Friday, December 28, 1962. Afternoon session. Same appearances. Respondent's witnesses:

MR. JOHN RUFFALO, JR., Attorney at Law, offered himself as a witness in his own behalf, and, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION OF MR. RUFFALO.

(698) By Mr. Montani:

Q. What is your name, please? A. John Ruffalo.

Q. You also go by "John Ruffalo, Jr."? A. I was originally identified as "John Ruffalo, Jr.," because of my father, whose name was also John Ruffalo, but since his death I have dropped the name, "Jr." and have carried the name, "John Ruffalo."

Q. Do you have a middle initial? A. I have no middle initial.

Q. What is your address, Mr. Ruffalo? A. My address is 700 Warner Road, Hubbard, Ohio.

Q. And your age? A. My age is 49.

Q. Where were you born? A. I was born in Youngstown, Ohio.

Q. And how long have you lived in Youngstown? A. Well, I—most of my life, except going away to school and the year or so—the four years I lived out in Poland and the year and a half I have lived out here in Hubbard.

Q. Poland and Hubbard are considered suburbs of Youngstown? A. Yes.

Q. And you went to the local schools, then? A. Went to Rayen High School.

(699) Q. Then what law school did you graduate from? A. I graduated from Youngstown University.

Q. In what year? A. In '45. I finished up about three or four subjects that I had there and then went down to

Cincinnati and took the cram course under Judge Gesswiler.

Q. And you were admitted to the Ohio Bar to practice law in Ohio in '45? A. In August of '46.

Q. August of '46. What was your father's occupation? A. What.

Q. What was your father's occupation? A. He was a practicing attorney in Youngstown, Ohio.

Q. For how many years? A. He had—he was admitted to the Bar in December, 1910 and practiced till 1953.

Q. In other words, he practiced in Youngstown for 43 years? A. That's right.

Q. Do you know how long he had his office on the Fifth Floor of the Mahoning Bank Building? A. Over 30 years.

Q. And that is the same suite of offices that you occupy? A. The same suite of offices that I occupy.

Q. Have you been admitted to practice in the Federal Courts? A. Yes, I have. I have been admitted to practice in the (700) Federal Courts.

Q. Now, let me ask you whether it is a fact or not that most of your business in law is on the side of the plaintiff? A. I am a Plaintiff's lawyer wholly and thoroughly, and I make no apologies for it.

* * * * *

Q. Is most of your practice in the personal injury field? A. Most of it is in the personal injury field.

Q. Your father's practice, was it also in the personal injury field? A. It was also mainly and almost wholly in the personal injury field.

Q. Were many of his cases cases in which railroads were the defendants? (701) A. The major portion of his practice of law was railroad cases.

Q. In your practice do you have many suits in which the defendant is a railroad? A. I have a good number of them; not anywheres near the number he used to have.

Q. Now, let me ask you this: Did your father have many clients from outside the Youngstown area?

Mr. Haynes: I object. I don't see where that has any bearing on the subject.

Mr. Montani: It is background.

Chairman Beirne: All right, go ahead.

A. Most of my father's business came from outside the City of Youngstown.

Q. Did he have a number of clients from in and around the City of New Castle, Pennsylvania? A. His name was as well known over there as it was in Youngstown.

Q. Have you also had a number of clients in and around the City of New Castle, Pennsylvania? A. Yes, I have. I have had a number of them.

* * * * *

(707) Q. Do you employ in your practice, Mr. Ruffalo, people that do investigating work for you? A. Yes, I do.

Q. Have you always employed certain people to do investigative work? A. Always employed certain people to do investigative work for me.

Q. Why is that necessary? A. Well, in order to prepare a case, the case has to be thoroughly investigated, particularly in railroad cases where railroaders are hard to locate. They are clannish; they have a code of their own, where they will not talk to anybody unless they know that they are a railroader or are sure that they are not connected with the company.

(708) Q. Is it the general practice for plaintiffs' lawyers to employ investigators in their offices? A. It is a general practice for a plaintiffs' lawyer to have investigators, just like it is for any other lawyer to have investigators.

Q. Is it a general practice in the profession? A. In the profession, to have investigators, yes.

Q. Now, Mr. Ruffalo, I am going to ask you some questions about a complaint filed by the Mahoning County Bar Association, the Relator, against you as Respondent. When did you receive this complaint? A. Some time after —I don't know whether it was a—a couple of days after the middle of September. Maybe the 15th, 17th, 18th of September, something like that.

Q. Of 1962? A. 1962.

* * * * *

(729) Q. All right. I think we will pass to Charge No. 8, and this involves the giving of money to (a) Clara Beighley and (b) Naomi Clark. Did you in fact loan any money to these two people? A. I loaned them money with the understanding that it would have to be paid back to me regardless of the outcome of the lawsuit.

* * * * *

Q. Did you offer Mrs. Beighley and Mrs. Clark money in order to obtain their lawsuits? A. I certainly did not.

Q. Going to Specification (A) here concerning Mrs. Clara Beighley, when was the first time that you gave her any money? A. Well, the first time I gave her any money was December (730) the 24th, 1957.

Q. Do you remember offhand when you obtained her case? A. I obtained her case on July 23rd, I believe the date was, of 1957.

Q. July 23rd of '57. And the first time you gave her any money was in December of 1957. Do you remember

the circumstances? A. She had been in my office a few days previous to that and had requested that I—had asked for some money for Christmas because she didn't have anything to eat.

Q. And you at that time gave her how much money? A. At that time I gave her $50. I sent her $50.

* * * * *

Q. Then subsequent to December of 1957 there were other times you gave her money, and to save time, if the Court please, I am not going to enumerate them, unless you want to. A. Yes. Over a period of four years I gave her $1,025.

Q. Over a period of four years? A. Four years, approximately four years.

Q. Let me ask you this, Mr. Ruffalo, in relation to Mrs. Beighley: Were you trying to give her money to tie up her (731) lawsuit or anything like that? A. Absolutely not. I never gave her money unless she asked for it or someone asked for her. Most of the times it was either because they had to buy coal or they had to pay taxes, or that they had to have food to live on. Mrs. Beighley had a crippled daughter or an invalid daughter that was living with her and she would often tell me that it was difficult for them to get along on the $67 a month that she got.

* * * * *

Q. Then tell us what your reason was for giving Mrs. Beighley this money? A. Well, the reason for giving it to her was that she was in dire need, and she would almost insist on it and plead with me for it, and if it wasn't her pleading, it was Mrs. Colangelo's pleading that the woman would not have coal for the Winter months or she didn't have any food and she was in dire circumstances, and the woman was really in that situation, and it was only because of that, out of humaneness, (732) that I felt that I should do it.

Q. All right. Turning to Specification (b) (8b), Naomi Clark, when was the first time you gave her any money? A. Well, the first time I—well, actually I might say that the first time I ever gave her any money, I believe it was the day that she came in my office and—or a couple of days afterwards, when she came in my office. It was sometime in the month of December; I don't recall just which day it was.

Chairman Beirne: What year?

A. Of '57. It might have been September or October. And she would come over to see me, and before she left, she said, "My car broke down, and I have it over here at a garage, and I need $15 with which to pay the garage man for it."

I reached in my pocket and gave her the $15. It was around noon or sometime like that, and that—I do not have that recorded here (indicating). I do have it on a slip of paper in my file on this case, but it is recorded as to what I have here in the office, that it occurred on October the 9th of '57.

Judge Middleton: I thought you said December.

Q. How much money over a period of how many years did you give to Mrs. Clark? A. Well, over '57, '58, and '59, and through '60, and to (733) the time that her case was settled, as of this record, I gave her $611.

Q. Now, as to this record, are you referring to the extra $15 you mentioned? A. No, the extra $15 isn't considered in here, and some other cash that I gave her from time to time is not considered in here.

Q. It would amount to about how much money? A. Actually it amounts to about $711 that I actually gave her.

Q. Besides this, or altogether? A. What?

Q. Besides what you have on this sheet, or altogether?

A. Oh, the whole total. Six hundred eleven plus another hundred.

Q. Plus another hundred. Seven hundred eleven over how many years? A. Over about, oh, three and a half years. And I might add that these were all at her request, with an understanding that they were to be paid back regardless of the outcome of the lawsuit, and that they were—on one occasion she needed food and clothing, one occasion was for gas, another one was for—to get her furniture out of storage so that she could set up housekeeping for her family.

Q. Were your reasons for giving the money to Mrs. Clark (734) any different from those that you stated you gave the money to Mrs. Beighley? A. No; only an act of humaneness, that's all.

* * * * *

(764) Q. You do have other cases in which railroads are not defendants? A. I do have other cases, other personal injury cases, other than railroad cases.

Judge Middleton: Is the bulk of your personal injury business against railroads?

The Witness: I would say the major portion of it.

Judge Middleton: The greater part of it?

The Witness: Yes, it is against the railroads.

By Mr. Montani:

Q. Mr. Ruffalo, do you employ or have you ever employed (765) Michael Orlando as an investigator? A. Yes, I have.

Q. What specifically has his job been? A. His job specifically has been to investigate cases which I turn over to him to investigate, particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding

railroad knowledge and the operation of railroads, and on occasions to transport witnesses for me.

Q. When did Mr. Orlando, or over what periods of time did Mr. Orlando work for you? A. Well, he had, some time—around the latter part of '53 he did some work for me, not a great deal. He had done some work for my father before that, and at that time, why, he carried through on some of the work that he had done, some of the cases for my father.

In 1957 actually I asked him if he would investigate the cases for me, and that is about the time that he actually, you would say, was really wholly and completely investigating for me.

Q. How did you pay Mr. Orlando? A. I paid him on a cash basis, whatever he would submit at the particular time for what work he had done, either by the week or the month, two months, or three months, whenever he presented his bill.

(766) Q. What amount did he receive?

Mr. Beard: That has been gone into, Mr. Montani. Mr. Orlando testified $25 a day.

A. He was to receive $25 a day and his expenses. Sometimes his expenses would be 10 to $15, maybe a little bit more, depending upon how much traveling he did or what he had to do.

Q. On the W-2 Forms that you furnished him, the amount put there as compensation, did that include the expenses? A. That included his expenses.

Q. Did you try to hide from the railroad the fact that Mr. Orlando worked for you?

Mr. Haynes: Object. It has all been gone into, and it speaks for itself.

A. I did not try to hide—

Mr. Bierce: Overruled. I would like to hear the answer. What was the answer?

A. I said, no, I didn't try to hide it, in so far as he did—in so far as moving around or doing whatever he wanted to do.

Mr. Bierce: But you didn't keep any records because you didn't want the railroad to know?

The Witness: I didn't want the railroad to know that he was involved in investigating, because I didn't know what it would—what repercussions that would have on him. As far as I was concerned, there was no hiding of it.

(767) Mr. Bierce: That is why you say you didn't keep any records, though, of payments to him?

The Witness: Only for his protection. That was all.

* * * * *

(784) Chairman Beirne: Now, the next question is this now: Whether or not it is going to be necessary to come back here. We don't want to preclude you from offering any additional testimony with respect to any of these three amendments, but I do think that you ought to let (785) us know within some reasonable period of time. What would you say on this? Why don't you do that when you file your answer?

Mr. Ruffalo: Right offhand, I don't want to be held to this—

Chairman Beirne: I understand.

Mr. Ruffalo: —but right offhand I would say, on 11 and 12 I don't see anything further that I would be able to add to that, but on 13 I certainly—

Judge Middleton: That is the conspiracy?

Mr. Ruffalo: Yes. I certainly want to make a request on that to put testimony on by law or something.

Chairman Beirne: Well, we want you to have every opportunity. The thing back in my mind now frankly is that the issue with respect to 13 is one of law and not fact, and if you agree with that after reflecting on it in the next couple of weeks, you may decide it isn't necessary to have another hearing for that, and you will certainly be given the right to make any argument you may wish to make with respect to that in a brief, but you let us know, and send a letter down to John McMillan, the Secretary of the Board, stating your position with reference to this question, as to whether there will be any further testimony taken up here.

Mr. Ruffalo: By the answer date?

(786) Chairman Beirne: By the answer date.

Mr. Bierce: That is two weeks.

* * * * *

(789) Mr. Bierce: You will have until the 14th to file your answer and give the Panel your report on whether you need another hearing to introduce evidence, not for argument or not for briefs or anything of that kind, just whether you have got to have another hearing to amplify the record in this case. That doesn't mean just arguments on the law; that means if you have evidence to introduce.

* * * * *

(791) Mr. Bierce: The net result of what we have given as to time, as far as I can see, is by January 14th we will have been notified or John McMillan will have been notified whether there is to be a further hearing, whether or not there is to be a further hearing on the facts; not briefs, but facts.

* * * * *

E. 2. Colloquies Between Board Members, Respondent Ruffalo, and Counsel Relating to the Amendment of the Complaint, Charge 13.

Hearing on Friday, December 28, Morning Session. Respondent's case:

APPEARANCES:

The Panel of the Board of Commissioners:

C. R. Beirne, Esq.,
Judge Henry Middleton, Esq.,
Bruce Bierce, Esq.

On behalf of Relator:

David C. Haynes, Esq.,
Comus M. Beard, Esq.,
Arseny A. Melnick, Esq.,
Charles P. Henderson, Esq.,
Peter P. Michaels, Esq.

On behalf of Respondent:

John Ruffalo, Jr. Esq.,
Ferdinand R. Montani, Esq.

(655) Mr. Bierce: Have you, Mr. Ruffalo, any record, any itemized record of this man's expenses, the days they were accumulated, and the hours that he worked on these days?

Mr. Ruffalo: We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we (656) worked this thing out this way. With any other person that has ever done any work for me, like Mr. Guthrie in my office, or anyone else, I have paid him

by check, but particularly for security reasons for this man, that was the reason we worked it this way.

Mr. Bierce: Mr. Ruffalo, here is a man working for the B. & O. Railroad; he is doing investigating work for you. You failed to keep the records. Was it because you knew that he was working in effect against his own employer, his other employer, and you were covering it up by destroying the records? Now, is that a fact?

Mr. Ruffalo: The fact was we knew that he as a railroad employee might be subject to some censure by his company if they knew that he was working for me as an investigator. They don't like it. But he has a perfect right to do that, as long as he does not go on their property or take photographs on their property or do anything like that. His time is his own.

Mr. Bierce: He was working on your cases that were against the B. & O. Railroad, wasn't he?

Mr. Ruffalo: He did on some, yes.

Chairman Beirne: On the Naomi Clark case, he said he did.

Mr. Ruffalo: Oh, yes.

(657) Mr. Bierce: He was working against the B. & O., and isn't that the reason that both of you have no records of the work that he did for you as an investigator; because he was working on cases against his own employer?

Mr. Ruffalo: That's right. That was to protect him.

Mr. Bierce: You knew that?

Mr. Ruffalo: Oh, yes, I knew it and—

Mr. Bierce: And you took part in it?

Mr. Ruffalo: There was nothing wrong with it. It was perfectly proper for him to be able to do those things.

Chairman Beirne: Mr. Ruffalo, do you think it is not improper for an employee to work on cases against his

employer, especially without his employer's knowledge?

Mr. Ruffalo: On his own time, in his time off, he has a right to do whatever he wishes.

Chairman Beirne: Even against his own employer? Do you think his allegiance to his employer ceases when he punches a timeclock?

Mr. Ruffalo: Lots of people hold down two jobs. Lots of people take another job—

Chairman Beirne: I am not questioning that. I am questioning the right of an employee to work with (658) a lawyer in suits against his own employer while he is on the payroll of his employer. Do you think there is nothing wrong with that?

Mr. Ruffalo: I don't see that there was anything wrong in what he was doing in investigating a case which he had not in any way brought into my office or had anything to do with.

Mr. Bierce: If you thought that, why didn't you keep all these records? Why did you destroy everything so there would be no records of anything, if you thought it was perfectly aboveboard and perfectly all right?

Mr. Ruffalo: I tried to protect him from any eventuality of this kind, that's all.

Judge Middleton: Because you knew it wasn't right; you knew that this was morally wrong?

Mr. Ruffalo: No, I didn't interpret it as being morally wrong.

Judge Middleton: I think so. So would you if it were put to you.

Mr. Ruffalo: I haven't been in the same situation, but I don't think there is anything wrong about a man doing something altogether different from the type of work he does on the railroad. He is a car bleeder on the railroad. That has nothing to do— (659) He was not out working

for some other railroad, nor was he out doing something or taking consignees away from them, or coal or anything like that.

Judge Middleton: He was doing worse; he was working against his own employer.

Mr. Ruffalo: Is there an "against" and a "for" in a lawsuit, I mean when evidence is to be brought out and produced? Is there something that is against anything? I don't see that it is being against.

Mr. Bierce: Mr. Ruffalo, if you were clear down in your own heart sure that there was nothing he was doing that was wrong, why did you need to, as you say—

Mr. Ruffalo: I didn't say—

Mr. Bierce: Just a minute—why did you say, as you say, that you needed to protect him?

Mr. Ruffalo: For his own benefit, not for mine.

Mr. Bierce: Not for yours. I am talking about him, not you. I am talking about him.

Mr. Ruffalo: Just in case that anything might come up.

Mr. Bierce: You knew that the B. & O. Railroad, if they knew he was investigating B. & O. cases for you, would raise the dickens about it, didn't you?

(660) Mr. Ruffalo: I didn't know that definitely, no.

Mr. Bierce: Did you have any suspicion that there would be anything else?

Mr. Ruffalo: I felt that there might be something, yes. That is the reason we did it this way, to protect him. For me, it didn't make any difference to me how he got paid or what the records were or anything else.

Mr. Bierce: I think that that is all I have in the way of questions.

Chairman Beirne: Is there anything else of this witness?

Mr. Ruffalo: I just want to say one thing here, your Honors. I feel that this man had a perfect right to do whatever he wanted to do on his off hours, and he isn't any different than any other person who goes out and gathers facts. He is a fact-finding person, and he may have a knowledge superior to mine in the railroading field, which I did not have and which—there isn't a railroad attorney, an attorney that is in the railroad business today, that doesn't have at least one or two or three of these men that they have working for them, either advising them or telling them about—

(661) Judge Middleton: You mean on the payroll of the railroad that they represent?

Mr. Ruffalo: There isn't one of them—the first thing they say to you when you get in this business is: "Get yourself a good railroad man so he can tell you what railroading is all about."

Judge Middleton: Who says this, this organization of special lawyers, the National Bar Association or who?

Mr. Ruffalo: No, the old-time lawyers, the people that know railroad law and have practiced railroad law. They have always had somebody that they could contact or somebody that they could reach out and talk to. I don't care whether—it happens to be that I do the majority of this type of work in this particular county and area, but I don't care whether it is in Pittsburgh or anywhere, I know that the top ones in Pittsburgh and the top ones in Cleveland and the top ones in Chicago, they all have one.

Judge Middleton: They all have an undercover man in the employ of the road?

Mr. Ruffalo: No, they have somebody that knows railroading and railroads.

Judge Middleton: And you think that is all right?

(662) Mr. Ruffalo: Well, I can see no wrong in a man doing it on his own time.

Chairman Beirne: Even against his own employer?

Mr. Ruffalo: Well, he is not really against his own employer.

Chairman Beirne: Well, that is my question to you. Even if it is against his own employer; you make no distinction?

Mr. Ruffalo: No, I don't see that it is wrong. It is his time. I think our concepts have changed from the time when a man went to work in the mill and he worked 14 hours a day and he was owned by the boss and—

Mr. Haynes: Are we trying the American economic system here right now?

Mr. Bierce: Have you anything further?

Mr. Haynes: Yes. Right now I have a motion to add a 13th complaint. As far as that witness is concerned, I don't want him any more.

Mr. Haynes: Now, then, I want to move that this Panel adopt as the 13th Specification the following:

That Respondent did conspire with one, Michael Orlando, and paid said Michael Orlando moneys for preparing lawsuits against the B. & O. Railroad, the employer of said (663) Michael Orlando, during all the periods of time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company.

Mr. Ruffalo: Oh, I object to that very highly. There is nothing morally wrong and there is nothing legally wrong with it.

Mr. Bierce: It is just a charge. You will have a chance to answer that, if you desire.

Mr. Haynes: I didn't hear you.

Mr. Bierce: It is just a request to amend the complaint. It is only a charge, and we have indicated we would permit amendments to conform to the evidence. But in granting such a request, we would not preclude you from making any defense you have to these additional charges.

Mr. Ruffalo: May I speak on this particular amendment now?

Chairman Beirne: Yes, sure. Sure, you may address yourself to that.

Mr. Ruffalo: I don't think this amendment should be considered by this Panel at all or allowed in this case. It has nothing to do with me or with Mr. Orlando's particular problem. There is nothing legally wrong about what (664) he was doing, and I did not conspire or did not do anything to hurt his company in any particular way. Just because he was an employee of that company, it didn't mean that he couldn't go out and do whatever else he wanted to on his free time. I don't think that has anything to do with this particular case, and I think it is entirely wrong to put it in.

Mr. Montani: Gentlemen, may I say one word?

Chairman Beirne: Yes, sir.

Mr. Montani: When does the end of these amendments come? I mean the last minute you are here, Mr. Haynes may bring in another amendment. I think this gentleman has a right to know beforehand what the charges are against him and be heard on those charges. Now, if there are any further charges after this hearing is over—

Chairman Beirne: Well, any request that is made will have to be based on evidence that is developed at this hearing.

Mr. Montani: I understand that, but will they ever get this over with?

Chairman Beirne: Well, I have indicated before, with respect to the other two charges, Nos. 11 and 12, that the fact that we were granting those doesn't preclude (665) you from offering any evidence you may have with respect to them, but I believe Mr. Ruffalo said, as far as 11 and 12 are concerned, he had no additional evidence.

Mr. Ruffalo: Your Honor, I don't, because the testimony of Angelo Medure took care of 11 and 12. I think that is true.

Chairman Beirne: Now, is there anything about this request which takes you by surprise or puts you in the position where you are not able to offer your defense at this time?

Mr. Ruffalo: Well, yes, it takes me by surprise, and as to offering a defense, I don't know what defense you could put up to such a thing as this. I mean there is nothing wrong with what I did.

Chairman Beirne: That is a different question, Mr. Ruffalo. The motion has been in substance to add Specification No. 13, which is an allegation that you conspired with Orlando, while Orlando was working with the B. & O., to work on cases against his employer. Now, whether that is right or wrong is something for us to pass on.

Mr. Ruffalo: It's an abstract thing, a theoretical thing, that you cannot defend.

Chairman Beirne: Well, do you have anything to (666) say with respect to the question of whether this does or doesn't conform to the evidence?

Mr. Ruffalo: Well, certainly I would need more time; I would need considerable time. I couldn't answer you here today; it would be impossible for me to answer it. I don't know what to say, gentlemen. I am speechless on this particular type of charge.

Chairman Beirne: Well, we will give you an opportunity to think it over, because we are going to take a recess for lunch now.

* * * * *

(667) Friday, December 28, 1962, Afternoon Session:

Mr. Beard: Mr. Ruffalo, as far as Specification No. 13 is concerned, there aren't any more facts. It is between you and Mike Orlando. I am speaking of the facts on Specification No. 13.

Mr. Ruffalo: There may be facts I don't know of. I can't say that.

Mr. Bierce: He can hardly say at this time that you don't have some facts to introduce, and he may have something to offer.

Mr. Beard: Of course, it is entirely up to him.

Chairman Beirne: That is just what I have been telling him: That if he requests time to meet this 13th Specification to get evidence, if he has any, that we would consider granting it. That is what we said just before you came in.

Mr. Haynes: I hadn't thought of that. Just a second.

(Conference at the counsel table.)

Mr. Beard: We will stipulate that as far as we are concerned, the only facts that we will introduce in support of Specification No. 13 are the statements (668) that Mr. Ruffalo has made here in open court and the testimony of Mike Orlando from the witness stand. Those are the only facts we have to support this Specification No. 13.

Chairman Beirne: All right. At the time we adjourned at noon there was a request to amend the complaint by adding Specification No. 13. We hadn't ruled, and I told Mr. Ruffalo he had an opportunity to consider

it. And the ruling will be that the request to amend the complaint to add Specification No. 13 will be granted.

Mr. Ruffalo, what if any request do you wish to make with respect to this development?

Mr. Ruffalo: Well, I fear I am going to have to have an opportunity to put on evidence, if I may, in defense of it.

I would also like the specification itself to be amended to read: For the periods of time extending from '57 to 1961.

These matters dealing here with the particular Specifications in the complaint before this Court deal with matters from 1957 to '61. Any matters before that time are not now particularly within the province of this Panel. And I would like to amend it in that respect.

Chairman Beirne: Mr. Beard, what do you have (669) to say about that?

Mr. Beard: The only thing I could say on that is the fact that Michael Orlando on the witness stand this morning said he has been employed by Mr. Ruffalo from 1953 to July, 1961, and that is the reason we used that period of time. It was his own witness.

Mr. Bierce: This is a complaint on matters in here dating from 1957. Is there any reason why you would desire not to change it to '57 on to the present?

Mr. Haynes: If it will expedite matters, that is all right. Make it '57.

Mr. Beard: All right, '57 on to '61.

Chairman Beirne: Let's change that to "'57," then.

Mr. Beard: All right.

Chairman Beirne: Now, anything else, Mr. Ruffalo?

Mr. Ruffalo: Of course, I want an exception to this, and I want an objection, and ask that it be stricken out as surprise, and I feel it is improper. I don't think it is a proper specification to be considered by this Panel under

the rules of this Court. I want a continuance in case I must put on any evidence in order to meet it.

Now, may I ask, if this matter goes through, will there be some hearing next week or at some future date, (670) or will we submit briefs, or what do we do?

Chairman Beirne: No. If you request an additional hearing because of the claim of surprise with respect to this particular specification of misconduct, then that request will be granted, and the time that we will come back here will be determined by Judge McMillan or the Board. But I will say this: That we will want to get back here fairly soon to move this case along expeditiously.

Mr. Ruffalo: If we do come back, the testimony will be limited and restricted to just the particular issue in this Specification 13?

Chairman Beirne: Yes, because that, as I understand it, is the only specification that causes you to request further time.

Mr. Ruffalo: If there is law, may I submit that law to you?

Chairman Beirne: Definitely.

Mr. Ruffalo: For your consideration?

Chairman Beirne: Definitely.

Mr. Ruffalo: Because the National Labor Relations Board has already ruled on this question.

Chairman Beirne: That is all right. Any law that you may have, we will take that into consideration. We are going to request briefs from both sides, so that (671) would be one item that we would want covered.

Mr. Bierce: You refer to the Board having ruled on something. On what? On the authority of granting a new specification?

Mr. Ruffalo: No, I am talking about the rules, about the rulings and opinions of the National Labor Relations

Board in regards to employees doing this type of work. They have already ruled on this.

Chairman Beirne: That is all right. You can cover that.

Judge Middleton: Do you think those rulings are broad enough to permit an employee to accept work with respect to his own employer, as distinguished from other employees?

Mr. Ruffalo: If I am correct in what I have discussed with railroad workers and other attorneys involving the same matter, there have been cases that have been decided in favor of the employee and—

Mr. Bierce: You can cover that in your brief. These are apparently just legal questions, and if you have something that shows that this is a perfectly proper relationship, we want to see it, and you will have time to put it in your brief before it is considered.

Mr. Haynes: Now, I want to lay emphasis (672) upon this one fact, so he will not be misled: Now, the only evidence we are depending upon is that from his own lips to you gentlemen and from Orlando. We don't have anything else to support it.

Chairman Beirne: We understand. Now, is there anything else?

Mr. Ruffalo: The only thing we want to say is, we made no admission of any conspiracy or anything like that, conspiracy or concealment, because there was no implied secrecy, and there was no secrecy.

Chairman Beirne: May I raise this question, Mr. Ruffalo: If I understand your position with respect to this particular specification, you don't deny that this practice was engaged in by Michael Orlando with your knowledge while he was being compensated by you with reference to cases that you had involving the B. & O.; your position

is more one of law than fact? Is that correct, or am I wrong on that? I don't want to lead you into something, if I am wrong in it.

Mr. Ruffalo: Well, I would say it is probably more a problem of law, yes. The fact is he did investigate some of these cases for me.

Chairman Beirne: Involving the B. & O.?

Mr. Ruffalo: Involving the B. & O.

(673) Chairman Beirne: While he was working with the B. & O.?

Mr. Ruffalo: He so testified.

Chairman Beirne: And that was during the period in question?

Mr. Ruffalo: That was in the period in question—

Chairman Beirne: From '57 to '61?

Mr. Ruffalo: '57 to '61.

Chairman Beirne: You are not admitting he solicited business; you are saying or you don't deny that he carried on the practice of investigating cases for you?

Mr. Ruffalo: I do not admit any solicitation on his part at all, that his activities were purely investigative activities.

Chairman Beirne: And bringing witnesses to court?

Mr. Ruffalo: He was transporting some of the witnesses to court.

Chairman Beirne: And conferring with you, as he testified?

Mr. Ruffalo: Advising me on matters pertaining to railroad operations, yes.

Judge Middleton: "What is a bleeder?" and so on? That is, he would tell you what a bleeder is, and so on? (674) I know what they are; you don't need to explain it to me.

Mr. Haynes: I fired on a railroad myself; I worked

on them. A bleeder is the fellow that takes the air out of the hoses.

Judge Middleton: Yes, I know. I mean that is the kind of thing he told you?

* * * * *

Friday, August 16, 1963. Hearing resumed.

BEFORE THE PANEL OF THE BOARD OF COMMISSIONERS:

C. R. Beirne, Esq., Chairman; and
Judge Henry Middleton, Esq. and
Bruce Bierce, Esq., Members of the Panel.

APPEARANCES:

David C. Haynes, Esq. and
Comus M. Beard, Esq. and
James W. Mumaw, President of the Mahoning County Bar Association,

on behalf of the Relator.

John Ruffalo, Jr., Esq., the Respondent;
Ferdinand R. Montani, Esq.;
John Chester, Esq.; and
Richard Grieser, Esq.,

on behalf of the Respondent.

(1021) Mr. Chester: May it please the Panel, at this time we rest our case.

Chairman Beirne: Both sides rest?

Mr. Haynes: You bet we rest, your Honor.

Chairman Beirne: Case submitted. Mr. Grieser, you said you wanted to make some comments at the conclusion of this case?

* * * * *

(1025) Chairman Beirne: Now, I want to say this: That this Panel, as all the Panels, does take into consideration any prior charges against a Respondent, not for the purpose of determining whether or not he is

guilty or innocent of the case before the Panel, but in determining, if they find he is guilty of any charge, what should be the recommendation so far as discipline is concerned.

* * * * *

(1030) Mr. Grieser: We move to dismiss that specification [No. 13] as a matter of law. And I want your Honors to consider this very carefully when I brief it, on the ground that the facts as stated, as distinguished from the conclusions reached by the Relator, do not constitute misconduct under the Ohio Supreme Court rule.

Chairman Beirne: No, that is not the question raised. What Orlando did was work with Respondent in connection with cases that the Respondent had as Counsel against the B. & O. Railroad—

Mr. Grieser: Some of those cases, yes.

(1031) Chairman Beirne: —at the same time that Orlando was employed by that railroad. There is no question of fact on that.

Mr. Grieser: There is no question on that, and I am prepared to, I think, demonstrate that as a matter of law that does not constitute misconduct on the part of the Respondent.

Chairman Beirne: And you will put that in your brief?

Mr. Grieser: Yes, sir.

Chairman Beirne: Well, on that, then, we will reserve ruling until we have read your brief on that question. So that is about the only one I know of that we haven't ruled on.

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E. 3. Testimony of Michael Orlando.

Hearing on December 28, 1962. Respondent's witnesses.

(614)

MR. MICHAEL ORLANDO, called by Respondent, being first duly sworn, testified as follows:

Chairman Beirne: Will you state your full name and address, please?

The Witness: Michael Orlando; 315 West Wabash Avenue, New Castle, Pennsylvania.

Chairman Beirne: All right, you may proceed.

Mr. Ruffalo: This testimony will be in relation to Specifications Nos. 3 and 5.

DIRECT EXAMINATION OF MR. ORLANDO by Mr. Ruffalo.

Q. How long have you lived in New Castle? A. All my life.

Q. And where are you employed at the present time? A. At the present time I'm unemployed.

Q. And up until July of 1961 were you employed by the B. & O. Railroad? A. I was.

(615) Mr. Haynes: What year is that, please?

Mr. Ruffalo: July of 1961.

Mr. Haynes: July of '61.

Q. And were you suspended from your employment sometime during July of 1961 with the B. & O. Railroad? A. July of 1961. July the 21st, I was taken out of service.

Q. Some time prior to that time were you admitted to the hospital? A. I was.

* * * * *

(624) Q. Are you employed by me as an investigator? A. I am.

Q. How long have you been working for me as an investigator? A. I would say since 1953.

Q. And have you been working for me as an investigator since (625) 1957? A. I have.

Mr. Haynes: Well, he just said, "'53."

Mr. Ruffalo: Yes, I know he said that.

Q. Have you been employed by me in the year 1962 as an investigator? A. No.

Q. When was the last time that you were employed by me as an investigator? A. I—the last time was July the 21st—July the 18th.

Judge Middleton: This year?

The Witness: 1961.

Judge Middleton: I understood the witness to say that he is now an investigator. He didn't say that, then?

Mr. Ruffalo: Well, he isn't right at the present time. He hasn't worked for me since July, 1961.

Q. What was the reason for not being employed by me since 1961? A. Well, the B. & O. brought some charges against me, and over these charges, why, it caused me to be put in the hospital, and since then I have been under a doctor's care.

Q. Would you explain the basis, the wage basis, upon which you are employed by me as an investigator? (626) A. Well, I have cases that I investigate, and as I incur the expense, why—over a period of time I get my expense money, and from time to time, as the money is needed, I get it.

Q. Are you paid by the day or by the week or by the month? A. Well, I charge you so much a day and expenses.

Q. Well, how much do you charge me a day and expenses? A. I get $25 a day and expenses.

Q. What type of investigation do you do for me? A. I investigate practically all the cases that—

Q. All the railroad cases? A. All the cases. All the railroad cases, mostly railroad cases.

Q. What other services do you render for me? A. Well, I—we consult one another on lawsuits; I transport witnesses. I am with him—when he is filing these lawsuits, I mean as he is trying these lawsuits in Federal Court in Pittsburgh, Cleveland, Warren, whatever court, I am with him two or three days, four days, whatever time it takes.

Q. Do you contact witnesses? A. I contact witnesses.

Q. How many days a month would you say on an average that you do work for me? A. Well, I would say that offhand it would be, without (627) looking at the records, I mean, probably on the basis of 10 or 15 days a month.

Q. On an average? A. On an average.

Q. Now, in 1957 did I pay you the sum of $2,950 for investigation? A. That's right.

Q. Now, in 1958 I paid you the sum of $1,250, and what was that for? A. This was for investigating work.

Q. And in 1960 I paid you the sum of $3,829.25, and what was that for? A. This is for investigating work also. Some of this is a lapse from—

Q. Now, in 1959 I paid you the amount of $1,273.37, and what was that for? A. That's for investigating.

Q. And in 1961 I paid you the sum of $4,716, and what was that for? A. Well—

Q. What was that for? A. This was for investigating.

Q. Now, can you explain that amount of money there to me? A. Well, like I say, this—there was some of that—

there was a carry-over from one time to the other, and (628) when you and I settled up, that's what I told you that you owed me, the balance of the carry-over.

Q. When you stopped working for me in July of 1961— A. That's right.

Q. —a question arose— A. There was some money—

* * * * *

Q. Will you explain— A. Well, in this type of work it's like this: You go out after a witness; sometimes—I mean you have got expenses. I mean sometimes the witness is not there; you make frequent trips to get the witness, and I mean you just couldn't be running in the office getting money all the time. There was a backlog that I was owed, and when we settled up here, I had some money coming. I was in the hospital, and I figured it was a good time to settle up, so I had in the neighborhood of $3,000 coming, that's why this 4,716. We settled up for $2,000, but it's not all investigating work— (629) it's previous years.

Q. That was for previous years, and that was sort of a compromise on some of the—

Mr. Haynes: Now, I object to the leading form of this.

Chairman Beirne: Sustained.

Q. Was that in regards to some discrepancies in our account? A. That's right.

Q. And was there an adjustment made? A. There was an adjustment made.

Q. And you received that money by check? A. That's right.

Q. Now—

Judge Middleton: Now, what is the import of this last question? Did he receive $4,716.61, or didn't he?

Mr. Ruffalo: Oh, yes. He received—

Judge Middleton: You are talking about two thousand dollars and something here. You don't mean to vary this amount, then?

Mr. Ruffalo: No, the amount stays the same. We had a dispute, not a dispute, but some discrepancy in amounts that were owed, and we had been talking about them for some time before that and—

(630) Judge Middleton: I don't know; I am not interested in that. I just want to know if that is the figure as it stands.

Mr. Ruffalo: I lost my train of thought.

Judge Middleton: The last one you asked about was for the year 1961, forty-seven hundred and some odd dollars, and you established that there was $2,000 added to what he would otherwise have been paid because of a compromise and his claim was adjusted.

The Witness: That's right.

By Mr. Ruffalo:

Q. Would you explain as to how you would submit your record of payment to me? A. Well, as I did the work, I—and I would present my expense account for the work that I had done for that period, it could have been for a week, it could have been for two weeks, it could have been for a month, and I got my money.

Q. And would it sometimes run longer than a month? A. Sometimes it would run a couple of months; it would lapse over.

(631) Q. Would it ever extend beyond that? A. It was—I couldn't be running in there for money all the time, doing this type of work. I mean as you—

Mr. Bierce: Just answer the question and we will get along faster.

A. As I incurred the expenses, I kept a record of them, and when I went in to get my money, I would produce my record and I would get my money.

Q. Would you report this on your income tax? A. Absolutely.

* * * * *

CROSS EXAMINATION OF MR. ORLANDO
by Mr. Haynes.

Q. You worked for the B. & O. Railroad, Mr. Orlando, until July of 1961; correct? A. Right.

(632) Q. Were you working five days a week or 40 hours a week? A. Five.

Q. You worked for the B. & O., and you worked steadily from January 1st, '61 until July of 1961 for the B. & O., 40 hours a week? A. Right.

Q. You were paid, however, on the basis of $25 a day for the year 1961 for the first six months by Mr. Ruffalo, since you said you didn't work subsequent to July 18th for him; you worked what would amount to the equivalent of 187 days at $25 a day for him for the first six and a half months of '61? A. Twenty-five dollars a day and expenses.

* * * * *

(633) Q. Now, how, then, could you conceivably work 187 days for Mr. Ruffalo up until July 18 of '61 and work 40 hours a week for the B. & O. Railroad? Tell us. 187 days—

Mr. Bierce: You have asked the question. Let him answer.

A. That is the gross money that was taken out of that office, including expenses. That is everything.

Q. Look there (indicating). You reported that as fees and commissions; you didn't report that as expenses?

A. I reported this as my income tax. Wait a minute. This is the gross—

Q. You go ahead and explain it. A. I paid income tax on this.

Q. Why, sure, you did. A. Out of this I filed my expenses and—

Q. All right. You paid income tax on $4,716, didn't you? A. It's right there.

Q. Did you pay income tax on $4,716? (634) A. I did.

Q. Yes? A. I did.

Q. Yes. Well, then, you didn't pay anything on the expenses that were over and above this, did you? A. What expenses? That's the gross money that was taken for that year.

Q. Oh! A. The gross money that I took out, that he paid me.

Q. How much did you make from the B. & O. Railroad Company until July 19th, 1961? A. Thirty-three hundred dollars. In the neighborhood of $3300.

* * * * *

Mr. Ruffalo: He testified, too, that the amount included some back payments.

(635) Mr. Haynes: I don't care what it was paid for—

* * * * *

By Mr. Haynes:

Q. So you took in more from Ruffalo in 1961 than you took in from the B. & O. Railroad; is that right?

Chairman Beirne: Your answer, Mr. Orlando?

A. According to the records, yes.

Q. Yes. All right. A. But they are not—

Mr. Haynes: You have answered the question, Mr. Orlando. That's all I asked.

Chairman Beirne: He has a right to explain. The question was very broad, "You took in." Now, do you want to say something?

A. This is a gross amount. I don't know what he—this is the gross amount I took out for that. Out of that—that includes everything.

(636) Q. Mr. Orlando— A. Expenses and everything. That's the gross amount, wages, gasoline, everything, expenses.

* * * * *

(637) Q. Did you bring with you your expense records, and so forth? Did you bring any records with you? A. I didn't bring no records.

* * * * *

Q. Well, didn't John Ruffalo ask you to bring along your records today to further corroborate or substantiate what might be in his records about your employment? A. There's my records there (indicating).

(638) Q. These are records you had in your possession? A. No.

Q. Well, who had these? A. What?

Q. Who had these records up until this morning?

Mr. Ruffalo: They are mine.

Mr. Haynes: Now, wait.

Chairman Beirne: Don't interrupt him, Mr. Ruffalo. Go ahead.

Q. Who had these records in their possession prior to this morning? A. I didn't have them.

Q. You didn't have them. Had you ever seen them? A. I—

Q. Had you ever seen them? A. I had—no.

Q. Had you had duplicates of them of any kind? A. No.

Q. No. How did you know how much, then, to pay on your income tax?

Mr. Ruffalo: I object to it.

Chairman Beirne: Overruled. I think that is proper.

Q. How did you know how much to pay if you never had these records and you didn't know the exact amount? Can you answer (639) that one? A. I went in with my—

Q. How did you know how much to pay if you didn't have any records to indicate how much he paid you?

Mr. Bierce: Let him answer. Let him answer.

A. I went in with my records at the end of the year when it come income tax time. I had the records. He couldn't have possibly had the expense accounts; I had them.

Q. Well, didn't he keep a record of when he paid you; didn't he pay you by check in the usual course of business? A. He paid me by cash.

Q. Always by cash? A. That's right.

Q. And then you signed a receipt for him that you received that much? A. Sometimes, yes. Sometimes.

Q. Mr. Orlando, did you sign receipts for Mr. Ruffalo that you received these amounts of money that are represented by the gross amounts on each of these withholding receipts here? A. I did.

Q. Did you sign receipts? A. I did, yes.

(640) Mr. Haynes: Now, then, I want those receipts that he signed on behalf of Mr. Ruffalo this afternoon for those various amounts.

Mr. Ruffalo: He did not sign any receipts.

Mr. Haynes: He didn't sign any receipts? Which of you is telling the truth?

Mr. Ruffalo: I am telling the truth. He did not sign any receipts. I gave him cash.

* * * * *

(642) Q. * * * Now, then, during all of that period of time you were working a 40-hour week for the B. & O. Railroad, is (643) that right; for all of that period of time you were working a 40-hour week for the B. & O. Railroad? A. Right.

Q. Is that right? A. That's right.

* * * * *

(645)

RE-DIRECT EXAMINATION OF MR. ORLANDO
by Mr. Ruffalo.

* * * * *

Q. Can you tell me how many days off you have a week? A. Well, when I worked five days, I would have two days off.

Q. What days would you normally have off? A. Well, like Thursday and Friday, Monday or Tuesday, weekdays.

Q. And what are your hours of work? A. I work at night, from 11:00 to 7:00, 11:00 P.M. at night (646) till 7:00 A.M. in the morning.

Q. Are you able to work during the daytime on— A. I am.

Q. That time during the daytime is your time; is that right? A. That's right.

Q. Are you free to do what you want to do? A. I am.

Q. Have you ever solicited a case of the Baltimore & Ohio Railroad? A. I did not.

Judge Middleton: What is his work?

Mr. Ruffalo: What?

Judge Middleton: What was he doing for the B. & O.?

Mr. Ruffalo: Oh!

Q. What is your occupation for the B. & O. Railroad? A. I'm a car bleeder. A car bleeder.

Judge Middleton: Brakes?

Q. Car bleeder? A. Car bleeder. I take air out, bleed the trains as they come in.

Mr. Ruffalo: That's all.

(647)

RE-CROSS EXAMINATION OF MR. ORLANDO
by Mr. Haynes.

Q. Now, then, Mr. Orlando, you mentioned something here, that at the end of one year there was a discrepancy between what you said you had coming from Mr. Ruffalo and what he said he owed you, a little friendly argument; is that correct? A. That's correct.

Q. Did he have any records at that time to determine a true amount? A. No, he didn't.

Q. Did you have any records? A. It was my—what I kept, the records that I kept, yes.

Q. And from your records, why, you determined the true amount that he owed you? A. I told him that he owed me this much money.

Q. And that is what he paid you? A. And he didn't give me the full amount; we settled for an amount of money.

* * * * *

(651)

EXAMINATION OF MR. ORLANDO by the Panel.

By Mr. Bierce:

Q. I would like to ask a couple of questions of you, Mr. Orlando. Let's say we are back a couple of years ago and you are out doing some investigative work for Mr. Ruffalo and you drive your car over to one of the surrounding towns here and you spend several hours interviewing witnesses and (652) you drive back again and you have to get a meal on the way; where did you keep track of the itemization of what you did that particular day? What did you keep it in? A. I kept a record. I mean—

Q. Tell me, what in? A. I had a pad that I kept. When I went in to get my money, I had to show it, and as time went on—

Q. Now, let's not get time going on. You went out the other day and you ran up expenses and time,— A. That's right.

Q. —and you put it on something, because you can't keep it in your head? A. I did.

Q. What did you put it on? A. I had a pad I put it on.

Q. Where is that pad now? A. Well, I don't have it now.

Q. What did you do with it? A. Well, after my records were filed, I had no occasion for it.

Q. After your records were filed where? A. I believe my income tax will show the expenses. The expenses are on it.

Judge Middleton: Where are they? Where is your income tax?

(653) The Witness: Income tax record?

Judge Middleton: Yes. Where are they?

The Witness: I have them for a number of years. I have them for four or five years.

By Mr. Bierce:

Q. All right, let's get right back to this thing you put this daily expense in. Was that a loose-leaf booklet, or what was it? A. It was a pad that I—

Q. What is a "pad"? You mean a pad like that (indicating)? A. Well, similar to that (indicating) that I kept my records on.

Q. Well, let's say that you worked for a whole week or six days, when you would go out and do something. Do you make a page for each day? A. I did.

Q. All right. You say you did? A. Yes.

Q. All right. Now, then, you get a series of these pages with those itemizations of your expenses and the time you spent during a certain day and over several days; then comes a time for an accounting with Mr. Ruffalo. Tell us how you did that. A. Well, I had a sheet that I would bring in at the end of the year, say—

(654) Q. Wait a minute. The end of the year? You didn't wait until the end of the year to make this accounting you speak about; you would make it every month or every two or three months? A. Oh, yes.

Q. All right. When you are going to make an accounting, how would you do it? A. I bring it in there to show, that this is what I did, this is what I spent, this is what it cost for meals. I had a record.

Q. What did you do with those slips you showed him; where are they? A. I just don't have them now.

Q. Did you give them to Ruffalo? A. I gave them to him—I showed them to him when I got the money.

Q. Then what did you do with the slips? A. I kept the slips.

Q. Where are they now? A. Well, I have no occasion now to—

Q. You have an occasion, because we want to see them. Are they gone? A. Well, I—I just don't have them.

Q. We have tried to get from Mr. Ruffalo an itemization of your expenses. Why did you throw them away? (655) A. Well, after I filed my income tax, I had no occasion for keeping them.

* * * * *

The Witness: I have my income tax records, yes.

* * * * *

MAR 24 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1187~~ 23

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

CRAIG SPANGENBERG,
1500 National City Bank Bldg.,
Cleveland, Ohio 44114,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner John Ruffalo, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 29, 1966.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals is reported in 370 F. 2d 447, and is printed in Appendix C hereto. Opinions of all the courts which have passed on the matter are appended in chronological order. The opinion of the Supreme Court of Ohio, reported in 176 Ohio St. 263, 199 N. E. 2d 396 (1964), is Appendix A. The first opinion of the District Court, reported in 249 F. Supp. 432, is Appendix B. The opinion of the Circuit Court of Appeals, reported in 370 F. 2d 447, is Appendix C. The second opinion of the District Court conforming to the Appellate instruction, not yet reported, is printed as Appendix D hereto. The decree of the Court of Appeals is printed as Appendix E.

JURISDICTION.

The decree of the United States Court of Appeals was entered on December 29, 1966, striking the name of petitioner from the roll of counsel permitted to practice before that court. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

There is a separate ground under which this Court should take cognizance of the subject matter. The petitioner, John Ruffalo, Jr., is a member of the bar of this Court, enrolled as a practitioner on October 24, 1960. Rule 8, of the Rules of The Supreme Court of the United States, provides that any member of its bar who has been disbarred from practice in any state or district will be forthwith suspended from practice before this Court, but then shall be afforded opportunity to show good cause why he should not be disbarred. Upon his response to the rule to show cause the Court will enter an appropriate ord . Although this Court has not yet taken notice of petitioner's disbarment below, it may do so upon this showing and may consider the brief herein as the showing of good cause by petitioner why he should not be disbarred from practice before this Court.

QUESTIONS PRESENTED.

The case presents two questions. One question is whether a lawyer representing an injured client in an FELA case against a railroad is entitled to pay another general employee of that railroad to find and interview witnesses, report track layouts, and operating practice, and otherwise investigate and report on the facts of the case, without being disbarred on that ground that secret investigation by an undercover agent is unethical.

The other question is whether a lawyer who has an extensive litigation practice, in a state which does not prescribe any form of record keeping as a condition of practice, is required to make book entries proving his innocence of solicitation or other wrongdoing, is required to preserve such records, and is required to produce them when investigated on pain of an inference of guilt justifying disbarment for failure to do so.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Amendment V, Constitution of the United States.

[*Rights of Persons*]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Amendment XIV, Constitution of the United States.

[*Rights of Citizens*]

"*1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. U. S. C. Title 45, Section 60.

"*60. Voluntary furnishing of information not to be prevented.*—Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

4. Canons of Ethics, Canon 10.

"The lawyer *should not* purchase any interest in the *subject* matter of the litigation which he is conducting."

STATEMENT.

The petitioner was ordered indefinitely suspended from the practice of law by the Supreme Court of Ohio on May 20, 1964, on two findings of alleged misconduct. That order is final and is not here subject to review. Petitioner does not question the findings of fact as to his conduct, but insists that his conduct was not wrongful, nor unprofessional, nor indicative of any infirmity of fair character.

Thereafter the District Court of the United States for the Northern District of Ohio ordered the petitioner to show cause why he should not be disbarred in that court. The District Judge accepted the findings of fact of the Ohio Court but disagreed with its legal conclusion. He found there was no misconduct, and no reason to disbar petitioner, and refused to suspend him from practice.

The Court of Appeals for the Sixth Circuit in turn ordered petitioner to show cause why he should not be stricken from the roll of that Court on the basis of the state disbarment order. The Court of Appeals reviewed the record of the state disbarment proceedings and concluded, in the majority opinion, that one of the two charges did not justify discipline but that the lone charge of hiring an "undercover agent" did sustain the state court discipline and required petitioner's disbarment from practice before the Court of Appeals. The minority opinion of the Court of Appeals, dissenting, found that neither charge of misconduct on the conceded facts justified suspension from practice and approved the decision of the District Court.

The District Judge, in his first opinion, had announced that he would reconsider his conclusions after the determination by the Court of Appeals in its hearing. The Court of Appeals opinion admonished the court below that "it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state."

Thereupon the District Court issued a second opinion stating "an abiding conviction" that its original findings and conclusions "were correct," but recognizing also that the orderly administration of justice compels a district court "to respect and defer to the opinions of its circuit court of appeals." By order effective March 11, 1967, Petitioner John Ruffalo, Jr. was suspended from practice before the District Court. (87a)

There is no factual dispute to reveiw. The only issue before the District Court and the Court of Appeals was the legal conclusion to be drawn interpreting conceded conduct. Under the applicable state practice a Board of Commissioners on Grievances and Discipline considered a total of fourteen charges of unethical conduct laid against petitioner. They found seven charges proved and seven unfounded. The Supreme Court of Ohio, which has final fact-finding power under its practice, reviewed the recommended findings and conclusions of the commissioners and found that only two charges were sustained. These two charges were the basis of the proceedings in the federal courts below. (1a) (9a) (28a)

One charge, denominated Charge No. 8, was that petitioner advanced money for living expenses to certain clients. It was found—without dispute—that during the pendency of two FELA wrongful death cases the petitioner

made small advances from time to time to the two needy widows, at their supplication, to help defray living expenses. Total loans to one widow, over a period of four years, amounted to $1,025; and to the other over a period of three and a half years amounted to $611. Both loans were repaid out of settlements finally obtained. In neither case was there a promise to make regular loans as a condition of employment. (32a) (81a)

At the time petitioner made the loans there were four Ohio Supreme Court decisions in earlier cases which held that it was proper for a lawyer, as an act of kindness, to make small loans to needy clients, and the overwhelming majority view in the United States held no breach of propriety in such practice. The Supreme Court of Ohio, reversing its earlier decisions, held that petitioner's conduct was "in effect" a purchase of an interest in the litigation and violated Canon 10 which reads: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

The District Judge found that this strained construction of Canon 10 was unwarranted, that loans made subject to obligation to repay are not per se unethical, and that petitioner's conduct in this respect did not constitute a ground for disbarment. (36a)

The Court of Appeals did not pass upon the validity of this charge, saying: "We need not, and do not, announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. We do not reach that question." (58a)

The second charge against petitioner, which alone furnishes the basis for the petitioner's disbarment from the rolls of the Court of Appeals, is that the petitioner hired a railroad car inspector to act as his investigator in

preparation and discovery activities in his injury cases, some of which involved the railroad company general employer. The admitted facts under Charge No. 13 are that one Michael Orlando was a car inspector for the Baltimore & Ohio Railroad in his general employment. Petitioner hired Orlando to act as a free-lance investigator during his off-duty time, paying him $25.00 per day plus expenses. Petitioner had an extensive injury case practice which included many FELA cases. Some of these were against the Baltimore & Ohio Railroad, and Orlando investigated the facts in such cases. He had no access to any confidential information or defense files and breached no fiduciary duty, but he did have valuable information as to yard conditions, track layout, operating customs, and access to fellow-employee witnesses.

It was originally charged against petitioner that he also had hired Orlando to solicit cases for him. No such charge was sustained at any level of the proceedings. The Board of Commissioners themselves dismissed six out of the seven charges of solicitation as being unfounded. The Board did recommend that one charge of solicitation be found sustained, but the Supreme Court of Ohio in its review of the record found no preponderance of evidence to sustain it.

The Supreme Court of Ohio found that the employment of a railroad employee to investigate cases against his own employer per se was improper and unethical. The District Court held that per se it was not improper for an attorney to do so, and further found no evidence and no claim that petitioner caused Orlando to take unfair advantage of the Railroad nor that he attempted to influence testimony or engage in any unethical practice. (49a) (50a)

The Court of Appeals majority characterized the work

of Orlando as "espionage" and said: "We cannot find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information in suits against his own employer, does not exhibit the fair character and integrity which must be the mark of a lawyer."

The minority opinion in the Court of Appeals holds it to be a fundamental violation of every principle of due process to disbar petitioner for alleged misconduct in hiring Orlando. The charge was added as a make-weight after the testimony as to Orlando's activities and pay had been taken. It was not included in the original charges. No Canon of Ethics can be found by any stretch of language to condemn or prohibit the practice. No case ever has held the hiring of investigative work from a non-fiduciary employee of a corporate defendant to be improper, any more than it would be improper to pay an employee for his time lost in submitting to an interview. In short, conduct apparently rightful at the time was held, ex post facto, to be wrongful and, in an astonishing transposition, it was held that petitioner should have known it was wrongful when he engaged in the conduct.

There is another issue in this case, related to a lawyer's record keeping, which likewise involves due process and the constitutional rights of lawyers. No clear finding was made on the issue, so that it did not become an official basis for the disbarment action, but both the Supreme Court of Ohio and the Circuit Court of Appeals stress it as a bolstering argument justifying discipline. In the state court proceedings written notice of the charges he was to meet were given to the petitioner, John Ruffalo, Jr. Extensive hearings were held on these charges. *After* the testimony had developed the use of Orlando as an in-

vestigator, the Board of Commissioners added the charge of unethical conduct in hiring Orlando as Charge No. 13, by oral motion, over the petitioner's strong objection. (43a) (84a)

Petitioner had testified that when he hired Orlando he wished to protect Orlando from reprisals from the Baltimore & Ohio Railroad, fearing they would fire Orlando if they knew he was doing part-time off-duty work as an investigator for Ruffalo. (The fear was justified—Orlando was fired.) Ruffalo paid Orlando in cash, kept a record of receipts until he closed his fiscal books and prepared Internal Revenue Form 1099's summarizing his annual total payments, at which time he destroyed the detailed receipts. He kept copies of the Form 1099 summaries, which he produced in response to subpoena.

The Chairman of the disciplinary investigating board then demanded that the petitioner, Ruffalo, produce "all his records of income and expense," "all his office records" and "all the records * * * relating to [his] financial transaction over the period of time." The petitioner, representing himself at the hearing, refused to produce all his financial records, as is noted in both the Supreme Court of Ohio and the Circuit Court of Appeals opinion.*

The State Supreme Court in its opinion asks (176 Ohio St. at 268): "Why did respondent not produce records to show what the payments were for?" The opinion

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* In the transcript of hearing before the Board of Commissioners on Grievance and Discipline of the Ohio Court, the refusal was in these terms:

> "I don't think they should have the right to just go down through my ledger and look at everything that is in my ledger. * * * I have the records here to establish my payments, and just to go down through my records here to find out what they can find out of any kind of any nature that they might try to throw against me here at this time and to amend their complaint on what I did here I don't think they should do that."

voices suspicion that perhaps there were records to show solicitation which otherwise could not be proved and draws the conclusion that the receipt records were destroyed "in order to prevent their use against Orlando in the proceedings brought against him by the B & O and against Ruffalo in the proceedings brought against him." (7a)(8a)

The Circuit Court of Appeals said in its opinion:

> "Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have" (except the Form 1099's) "were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court, and this Court had, and have, *the right to draw inferences as to what this conduct portrays.* The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?" (64a)

These arguments made by the courts below to justify the disbarment present the issue of what records a lawyer engaged in a litigation practice is required to keep. This Court recently has held, in *Spevack v. Klein*, ____ U. S. ___, 35 U. S. L. Week 4140 (U. S. Jan. 16, 1967), that the Self-Incrimination Clause of the Fifth Amendment has been incorporated in the Fourteenth and extends its protection to lawyers as well as other individuals.

If a lawyer actually has solicited cases and actually has kept records to show it, he may assert his constitutional privilege and refuse to produce them. The privilege will "not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."

It is clear that if the petitioner, Ruffalo, had in fact paid Orlando for soliciting and had in fact kept records,

he could have refused to produce them on constitutional grounds without incurring disbarment. In the instant case he insisted that he had kept only such records as Internal Revenue required, and had destroyed the detailed cash receipts. The Circuit Court of Appeals holding must mean that a lawyer who has a right to refuse to produce his records has no right not to keep them and has no right to destroy them.

On the basis of petitioner's "failure to carry transactions in his books, and his destruction" [before subpoena] "of what records he did have," the court below has said that: "The Ohio Bar, its Supreme Court and this Court had, and have, the right to draw inferences as to what this conduct portrays."

Such holding is an absolute denial of the privilege against Self-Incrimination and the Presumption of Innocence. It means that a lawyer is affirmatively required to post records detailing his innocence, is required to keep such records against the chance of some future investigation, and is required to suffer "inferences" of guilt if he fails to keep and produce them.

REASONS FOR GRANTING THE WRIT.

1. The Trial Bar Needs Guidelines for Permissible Conduct in Case Preparation.

The issue here presented is of vital concern to every practitioner at the federal bar. The essence of good trial work is thorough preparation. The decision below imposes stringent and arbitrary limits on the methods of preparation never before promulgated by any court or Canon.

Every lawyer who handles railroad cases knows that investigation of such cases presents special problems. The work of railroading is strange to an outsider. Railroaders speak in a jargon of their own, not overly intelligible to others. They are clannish men, not likely to talk freely to a stranger. Trial evidence concerning yard layout, equipment, and custom and practice demands that the witness be a man familiar with those matters, which necessitates calling employees from the yard of the railroad in question.

Obviously, the best man to investigate a railroad case is a railroader. The best man to investigate an admiralty case is a seaman. Zealous protection of the client's interest should compel a lawyer to hire the best investigator he can get. The Circuit Court of Appeals held that the lawyer can hire a Pennsylvania brakeman to investigate a case against the New York Central, but cannot hire a Baltimore & Ohio car inspector to investigate an injury case against the Baltimore & Ohio. The Court of Appeals said:

> "We cannot find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be the mark of a lawyer."

We would argue that if he does not hire a yard employee to dig out vital evidence as to practices of that yard, the lawyer cannot adequately represent his client and may be guilty of culpable malpractice.

It is naive to suggest, as does the Court below, that "With the liberal use of our discovery practice, we consider that adequate preparation can be made without resorting to the methods chosen by Mr. Ruffalo."

Discovery interrogatories can only obtain answers based on the defense investigation. They do not reveal evidence the defense has not discovered, nor are answers to interrogatories always faithfully detailed and accurate. Good advance investigation not only helps the lawyer to frame his interrogatories and demands for production but also tests the accuracy of the official defense answers.

No Canon of Ethics condemns the practice of obtaining information from a *non-fiduciary* general employee. Canon 32 states that the lawyer should not render any service involving "corruption of any person or persons exercising a public office or *private trust.*" Michael Orlando, car inspector for the Baltimore & Ohio, exercised no private trust. Any conflict of interest between his on-duty work for his general employer and his off-duty work pertained only to Orlando and not to the petitioner, Ruffalo.

It is perfectly proper for the lawyer himself to interview the defendant's employees. He properly may interview *any* witness, not a party, without the consent of his opponent. The lawyer's right to interview railroad employees is protected by a special act of Congress. There used to be a standard rule forbidding the railroad employee from telling the truth to the attorney or the investigator for an injured fellow employee. He would be fired for talking to anyone but his own claim agent. Congress in-

tervened to prevent the intimidation of witnesses by enacting Section 60 of Title 45, U. S. C., which strikes down as void any rule designed to prevent employees of a common carrier from furnishing information to any person in interest as to the facts incident to the injury or death of any employee. The act further makes it criminal to attempt to discipline an employee for furnishing such information.

It is a valuable right, protected by federal statute, for the lawyer to interview witnesses. The effect of the decision below is to hold that the lawyer must exercise this right in person and cannot hire a fellow-employee of his own client to get the information.

Was it improper for Orlando to investigate cases when he was a general employee of the Baltimore & Ohio? The National Railroad Adjustment Board has expressly approved the practice, saying:

> "On the other hand there is no doubt whatever of the right of an employee, when off duty, to assist an injured employee or his representative in any manner including the gathering of evidence and so long as it is limited to the development of truth it cannot be regarded as disloyalty nor afford just grounds for discharge." Award No. 3624, 21 N. R. A. B. 63 (1st Div. 1939).

It is a strange result to hold that what Orlando properly could do himself and what petitioner properly could do himself became unethical when petitioner hired Orlando to do it.

2. The Independent Jurisdiction of the Federal Courts.

This Court laid down the test for review of a state court order of disbarment in *Selling v. Radford*, 243 U. S. 46, which holds that the state court's order constrains the

exclusion of the practitioner from the federal bar unless, upon intrinsic consideration of the state record, the federal court shall find:

> "(1) That the state procedure was wanting in due process,
>
> "(2) Comes to a clear conviction that the proof of facts relied on by the state court to establish want of fair character was so infirm that acceptance of the state court's conclusion thereon as a finality would be inconsistent with this court's duty, or
>
> "(3) Discovers some other grave and sufficient reason why this court could not disbar consistently with its duty not to take that action unless constrained under the principles of right and justice to do so."

Under Ohio practice the disciplinary Board of Commissioners may recommend findings of fact, but the ultimate decision as to the facts and the discipline will be made by the Ohio Supreme Court. The opinion of that court, quoted in full in Appendix A, recites the facts found.

The opinion finds two charges established. One charge was that petitioner made loans to two needy widows, described as "the advancement of living expenses * * * to enable a disabled client and his family to survive." (176 Ohio St. at 265) This was condemned as being "in effect" a purchase of an interest in the litigation. The Circuit Court of Appeals has found that this charge did not justify disbarment and petitioner will not elaborate upon it here. (3a)

The second charge found established was that "The respondent (petitioner here) conspired with * * * Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer." (176 Ohio St. at 265) As to this the state court held that: "In our opinion, one who believes that it

is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar." (176 Ohio St. at 269) (8a)

The Circuit Court of Appeals, accepting this finding and reviewing only the legal conclusion, said that it "cannot find totally invalid the view" that one who hires such an investigator "does not exhibit the fair character and integrity which must be the mark of a lawyer." This Court can and should review that conclusion. It is a violent departure from principles of trial preparation established by long and widespread usage.

3. Disciplinary Action on the Present Grounds Would Inhibit Enforcement of Rights Under an Important Federal Statute.

The Federal Employers Liability Act is a federal statute of importance. Claimants under FELA are not to be prevented from putting forward their claim by local oddities. This Court has said that, "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359, (1952). This principle is specifically applicable to disciplinary actions against lawyers. "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964). On this principle a contingent fee contract has been held proper in a Jones Act case even in a state which refuses to permit contingent fees in state-created litigation. *Greenberg v. Panama Transport Co.*, 165 F. Supp. 320, 324 (D. Mass. 1960).

The state court held that petitioner was guilty of misconduct in making occasional modest advances to widows, while their FELA claims were pending, for living expenses. Such a holding is contrary to that of every court which has spoken on the question, and was contrary to prior Ohio law. This Court ought to lay down reasonably clear rules of conduct it will require of those who have the privilege of practicing before it. For that purpose, the significance of the rule adopted by the Ohio court is that it will prevent impecunious FELA litigants who retain an Ohio attorney from obtaining the fair determination of their cause by a jury which Congress endeavored to guarantee them. Unless the injured or widowed can be advanced occasional monies with which to obtain the bare necessities of life, they have no choice but to accept "a quick and cheap settlement" of the sort which was a prominent abuse in the early history of the Act. See *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 3 (1964). The penniless cannot afford the luxury of the law's delays.

The state court also held that petitioner was guilty of misconduct in employing, during his off hours, a railroad employee to investigate cases, some of which were against the railroad for which the employee worked. Such a rule would prevent the effective investigation, and thus the effective prosecution, of FELA claims. The railroads' claim departments have ready access to the witnesses and to the equipment and records involved in the accident, as well as a full understanding of the railroad operations which were being performed. Attorneys for plaintiffs must make their own investigation more circuitously. The only effective investigator for this purpose, as testimony showed at the state hearing, is a railroad employee. There is not the slightest evidence that Orlando peered into con-

fidential company records, or that he investigated for respondent during the hours he was being paid by the railroad, or that he trespassed upon company property. All that is shown is that during his off-duty hours he obtained information for the attorney, gave him information, and was paid for this service to the client. (45a)

The intention of the Congress in enacting Section 60 of Title 45, U. S. C., was "to see to it that an injured employee could readily obtain all the information from witnesses, particularly employees of the railroad company." *Dugger v. Baltimore & O. R. C.*, 5 F. R. D. 334, 336 (E. D. N. Y. 1946). To rule that attorneys for FELA plaintiffs cannot employ railroad men as investigators would thwart that purpose.

In the *Brotherhood of Railroad Trainmen* case, 377 U. S. at 7 n. 13, the Supreme Court cited with approval a statement by Justice Roger Traynor:

> "Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty. Canons of ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified only if such a denial is necessary to suppress professional conduct that in other cases would be injurious to the effective discharge of the profession's duties to the public. *Hildebrand v. State Bar*, 36 Cal. 2d 504, 522, 225 P. 2d 508, 519 (1950)."

The conduct of respondent condemned by the lesser courts in the present proceeding is not a commercialization of the legal profession and it is not "ambulance chasing." Six of the original seven charges of solicitation were dismissed by the Board because they were not supported by the evidence, and the Supreme Court of Ohio, being in disagreement as to the facts, found the seventh and final

charge unproved. What is challenged here is the fair and effective preparation and prosecution of FELA claims. This case is another skirmish in what properly has been described as "the struggle of railroad workers to achieve the vindication of their legal rights in the face of the determined opposition of the employing railroads." Schwartz, *Group Legal Services in Perspective*, 12 UCLA L. Rev. 279, 283 (1965).

4. The Grounds Relied on For Disbarment of Petitioner Are so Arbitrary and Irrational That to Act on These Grounds Would Deny Petitioner Due Process of Law.

There are constitutional limits on the generally broad control a court has over those permitted to practice before it. It has been held that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 439 (1963). "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, 239 (1957). For purposes of this rule, there is no constitutional distinction between denial of admission to the bar and disbarment. *Cohen v. Hurley*, 366 U. S. 117, 123 (1961). Such limitations on the states apply *a fortiori* to a federal court when it considers disbarment of one of its attorneys.

The grounds on which respondent was indefinitely suspended from the practice of his profession in the state courts, and which are advanced in the present proceeding, are arbitrary grounds, bearing no rational connection to

his fitness or capacity to practice law. "While it is true that a professional standard is not to be judged by lay understanding, it also is true that when a practice, which is reasonable from the layman's point of view, runs afoul of a professional standard the burden of justification is on the profession. It is not met by a mere reiteration of a rule." Schwartz, *Group Legal Services in Perspective*, 12 UCLA L. Rev. 279, 283.

Ohio had held in *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747 (1892) in *Scheinesohn v. Lemonek*, 84 Ohio St. 424, 95 N. E. 913 (1911); in *Roberts v. Montgomery*, 115 Ohio St. 502, 154 N. E. 740 (1926); and in *Cleveland Ry. Co. v. Godfrey*, 28 Ohio Law Rptr. 466 (Ohio App. 1928), that it was proper for an attorney to advance both litigation expenses and loans to the needy on a promise to repay. In reaching a contrary result in petitioner's case the Supreme Court of Ohio noted that these cases were all decided before the court, in 1952, adopted by rule the Canons of Professional Ethics, and said: "In view of the adoption of those canons, those cases would no longer be applicable to the extent that they are inconsistent with provisions of the canons." 176 Ohio St. at 265, 199 N. E. 2d at 398-399. (3a) (4a)

Nothing in the canons gives fair notice that they are changing a well-settled body of Ohio law and an established doctrine fully developed in the cases elsewhere. It is true that Opinion 288 of the Committee on Professional Ethics and Grievances of the American Bar Association, delivered in 1954, and published 41 A. B. A. J. 30 (1955), condemns advances, though under circumstances more aggravated than those involved in this case. But it would be surprising doctrine that the opinion of a committee of a voluntary bar association, issued *after* the Canon of Ethics had been adopted in Ohio, should be deemed to

override the decisions of the courts of Ohio and of other states. An Ohio commentator, writing subsequent to Opinion 288, did not recognize that such a change had occurred. He wrote: "It should be made clear, however, that the mere loaning of money to a client is not objectionable, per se. * * * The loan is objectionable when used as a means of securing a client." Note, 16 Ohio St. L. J. 114, 116 (1955). To hold that the advances made by petitioner constituted professional misconduct would be an unforeseeable and retroactive expansion of the rules regulating the conduct of Ohio attorneys.

The situation is even worse with regard to Charge 13, for here there is not even a Bar Association Committee opinion which arguably gave notice, nor any Canon which colorably can be cited as prohibiting the conduct there involved. The Board of Commissioners thought that the employment of Orlando violated Canons 29 and 32 of the Canons of Professional Ethics of the American Bar Association, without indicating which of the broad generalities of those two canons it deemed in point. The Supreme Court of Ohio simply said that "In our opinion" such conduct was wrongful, without pointing to any canon or rule of court claimed to have been violated. This is government by the length of the chancellor's foot, rather than government by law.

Even if this Court should think it undesirable for lawyers to make advances to clients or to hire railroad employees as investigators, it by no means follows that petitioner should be disbarred. The sounder course, the only constitutionally permissible course, is that followed by the Illinois Supreme Court in the case of *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 398, 150 N. E. 2d 163, 168 (1958). The court there held that the regional counsel plan of the Brotherhood was improper. An earlier

decision by an intermediate appellate court had approved the plan. The Supreme Court said that because of the earlier decision, "proceedings looking toward the imposition of discipline should not be pursued." If this Court should agree with the state court that petitioner's activities were improper—and we earnestly urge that it should not—it could announce by its opinion in this case its understanding to this effect. Petitioner, and all others admitted to practice here, could then guide their future conduct accordingly. To apply to this petitioner standards of conduct which could not fairly have been anticipated, and to punish him for violating those standards, would be "at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. United States,* 314 U. S. 306, 311 (1941). This Court should act on the premise that attorneys, like all others, are protected by the Fifth and Fourteenth Amendments against punishment except for conduct which has been defined in advance as improper and unethical or is so patently immoral that every reasonable practitioner would know it.

It is settled that penal statutes must give fair notice of what it is which is commanded or forbidden. *Connally v. General Construction Co.,* 269 U. S. 385 (1926); *Lanzetta v. New Jersey,* 306 U. S. 451 (1939); *Musser v. Utah,* 333 U. S. 95 (1948). This requirement is violated by a statute too vague on its face, and it is violated also when a statute, seemingly narrow and precise, is unforeseeably and retroactively expanded by judicial construction. *Boule v. City of Columbia,* 378 U. S. 347, 352 (1964). For almost a century it has been established that disbarring a lawyer from the practice of his profession, though done to protect the public rather than with the intent of punishing the lawyer, has the effect upon him of punishment, and

that laws with such an effect must meet the tests applicable to a penal statute. *Ex parte Garland,* 4 Wall. 333 (1867).

This Court has referred to "the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law * * *." *Cohen v. Hurley,* 366 U. S. 117, 122-123 (1961). To disbar petitioner would be contrary to that premise.

5. Petitioner's Disbarment Has Denied Him Due Process of Law.

Petitioner was entitled to claim the constitutional guarantees of due process, even though he was a lawyer. The point is preserved for presentation to this Court in that Point 3 of his Response to Order to Show Cause in the Circuit Court of Appeals stated:

> "3. Disciplinary action against respondent on the grounds relied on by the Supreme Court of Ohio would abridge his right to fair warning of the permissible bounds of professional conduct, and would deny him due process of law." (TR. RES. BRIEF, P. 1)

The Circuit Court of Appeals, in following the findings of the Ohio court, found that one charge which established lack of fair character was Charge No. 13 relating to the hiring of Orlando. No such charge had been preferred against petitioner when the Ohio disciplinary hearings had begun and he had undertaken to appear pro se to defend himself. It was only after the testimony had been fully developed, concerning the hiring of Orlando as investigator, that Charge No. 13 was added on the oral motion of the Chairman of the hearing. The hearing Board then demanded that he produce all of his financial records and particularly full records of all transactions with Orlando. It is clear that petitioner was required to produce

records to prove he had *not* hired and paid Orlando as a solicitor of cases.

Petitioner had made records only of cash paid, and these limited records he had destroyed after the information was reported on Internal Revenue Form 1099. For this conduct petitioner was condemned by both the Ohio Supreme Court and the Circuit Court of Appeals. Although Ohio has no statute or rule of court which prescribes any form of record keeping, the Ohio Supreme Court said:

> "If the respondent did not know it was wrong to do this" [hire Orlando] "why did he try to cover it up. * * * Why did respondent not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records * * * arouses a strong suspicion that those records would have been damaging to both Ruffalo and Orlando. * * * It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against * * * Ruffalo in the proceedings brought against him." (176 Ohio St. at 268-269.) (7a)(8a)

The Court of Appeals for the Sixth Circuit adopted the rule of guilt by suspicion and inference, saying:

> "Ruffalo asserts that his use of cash to pay his agent, his failure to carry those transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this Court *had, and have, the right to draw inferences as to what this conduct portrays.* The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?" (Emphasis supplied.) (64a)

These statements show absolute disregard for Ruffalo's constitutional rights. Let us assume for purpose of argument that Ruffalo was really guilty of solicitation through Orlando. If he were, then he had his Fifth Amendment right, absorbed into the Fourteenth, to refuse to produce them. If he did refuse, then no inference could be drawn therefrom and the penalty of disbarment could not be inflicted as the price of asserting the privilege.

If Ruffalo had a right not to produce any records he certainly had the corollary right to destroy any records he did have. If he had a right to destroy them, he must certainly have the right not to create self-incriminating records in the first instance.

The privilege against Self-Incrimination must include the right not to make records and not to keep records, as well as the right not to produce them. If Ruffalo were really guilty of solicitation, then no suspicion of guilt or inference of guilt drawn from a destruction of receipts or a failure to keep detailed financial records could justify his disbarment.

Assume on the other hand that Ruffalo is as innocent of the unproved charge of solicitation as he insists he is. When demand for the records was made he refused, properly, to produce his general financial records, and said that any detailed records as to Orlando were either never in existence or were, in the case of the cash receipts, destroyed. If he denies guilt, is he required to produce records to prove affirmatively his innocence? This would lead to the incredible result that constitutional immunities protect only the guilty and not the innocent.

Petitioner's failure to create and preserve records to prove his innocence cannot give the United States Court of Appeals the right it claims "to draw inferences as to what this conduct portrays."

CONCLUSIONS.

A writ of certiorari should be issued in this case so that this Court may outline for the trial bar reasonable guidelines as to the bounds of permissible conduct in the investigation and preparation of contested cases; and so that the constitutional rights of lawyers as a class may be illuminated and preserved.

Respectfully submitted,

CRAIG SPANGENBERG,
Counsel for Petitioner.

FILED
MAR 24 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. ~~1187~~ 73

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

CRAIG SPANGENBERG,
1500 National City Bank Bldg.,
Cleveland, Ohio 44114,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

MAHONING COUNTY BAR ASSOCIATION *v.* RUFFALO.

Attorneys at law—Misconduct—Disciplinary action—Suspension—Acts warranting.

(D. D. No. 57—Decided May 20, 1964.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The facts are stated in the opinion.

PER CURIAM. This proceeding was set in motion in 1962 when the Mahoning County Bar Association filed its written complaint with the Board of Commissioners on Grievances and Discipline, charging John Ruffalo, Jr., an attorney at law of the city of Youngstown admitted to the Bar of Ohio in 1946, with unprofessional and unethical conduct in violation of the Canons of Professional Ethics.

The complaint, consisting of 14 charges, was referred to a three-member hearing panel for the taking of evidence and for report. Upon hearing, the panel concluded that charges numbered 3, 8, 9, 10, 11, 12 and 13 had been proved, and that respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the panel and the record, the board recommended that respondent be disbarred.

As stated in paragraph five of the syllabus in *In re Lieberman* (1955), 163 Ohio St., 35, 125 N. E. (2d), 328, "the degree of proof required in a disbarment proceeding is a preponderance of the evidence." To the same effect see the *per curiam* opinion in *Cleveland Bar Association v. Fleck* (1961), 172 Ohio St., 467, 469, 178 N. E. (2d), 782.

In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes rec-

ommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts.

As to charge No. 8, it is stated in respondent's brief:

> "The facts * * * which are alleged in this charge are that respondent 'did advance monies to certain clients * * * while their claims were pending, which advances were deducted from any settlements * * * later received in settlement of said claims.' Those facts do not * * * constitute misconduct * * *.
>
> "* * *
>
> "The record shows that respondent did advance monies to certain clients, but with the understanding that such monies were to be repaid irrespective of the outcome of the pending litigation. * * *
>
> "A loan is not a purchase. So long as there is an agreement that the money is a debt and is to be repaid irrespective of the outcome of the case, it is nonsense to claim that the loan or advance amounts to the *purchase* of an interest in the litigation. Indeed, a contingent fee contract with an assignment to the lawyer (the recovery of which is wholly dependent upon the outcome) comes much closer to the prohibition in this canon [No. 10] than the simple loan or advancement of money. Yet such a fee contract is perfectly valid in the state of Ohio and has been upheld by the courts of Ohio in litigation involving lawyers' claims based upon such contracts. *Roberts v. Montgomery,* 115 Ohio St., 502, *Scheinesohn v. Lemonek,* 84 Ohio St., 424, and *Cleveland Ry. Co. v. Godfrey,* 28 O. L. R., 466 * * *." But cf. Canon 13.

Canon 10 provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 reads:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement."

It is clear that the word "expenses" appearing after the semicolon refers to "expenses of litigation.". It would not include advances of the kind admittedly made by respondent for "living expenses * * * during the period between the filing of and the trial or disposal of the case." See opinion No. 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A. Journal, 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association, v. McCallum* (1930), 341 Ill., 578, 173 N. E., 827, on this question with Canons 10 and 42.

It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons contemplate that this will be proper only where the advance is for "expenses of litigation."

It may be observed that the cases of *Roberts v. Montgomery, supra* (115 Ohio St., 502), *Scheinesohn v. Lemonek, supra* (84 Ohio St., 424), *Cleveland Ry. Co. v. Godfrey, supra* (28 O. L. R., 466), and *Reece v. Kyle* (1892), 49 Ohio St., 475, were all decided before this court adopted by rule the Canons of Professional Ethics. In view of the adoption of those canons, those cases would

no longer be applicable to the extent that they are inconsistent with provisions of the canons.

As to charge No. 13, the report of the board summarizes the evidence and facts as follows:

> "It is charged that the respondent conspired with * * * Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.
>
> "The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962, on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the respondent, Orlando was paid $25 a day plus expenses and investigated all of the respondent's railroad cases. He said that he worked an average of ten or fifteen days a month for the respondent. Withholding slips, internal revenue form 1099, were received in evidence * * * and showed the following amounts paid to Orlando by the respondent:
>
> "1957 — $2,950.00
> "1958 — 1,250.00
> "1959 — 1,237.37
> "1960 — 3,829.25
> "1961 — 4,716.00
>
> "According to Orlando, respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his income tax returns were filed * * *. Respondent stated:
>
> " 'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly

what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.'

"Later respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

" '* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike—'* * *.

"The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961 and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *.

"Although the full extent of Orlando's activities in behalf of the respondent could perhaps be better determined if respondent had submitted his records for examination as requested by the chairman of the panel, there is no dispute about the fact that the respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando

was working for that railroad * * *. Furthermore, the respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the respondent. The panel questioned the respondent at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages in having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *.'"

With respect to this summarization, respondent's brief in this court states:

"As stated by the board, there is no dispute in the evidence with respect to the foregoing charge. The board does indulge in some innuendoes, but the facts relevant to this charge are, simply stated, these: Respondent did hire Michael Orlando to investigate lawsuits for him, and some of those lawsuits involved claims against the Baltimore & Ohio Railroad Company. During this time * * * Orlando was an employee of the Baltimore & Ohio Railroad Company, but engaged in train service, that is, the service of a working railroad brakeman. While we do not consider it material, respondent did frankly testify that he kept no entries of payments to Orlando and that payments were made in cash."

Respondent contends that his employment of Orlando to work against the interests of Orlando's employer, B. & O., was proper by reason of the provisions of Section 60, Title 45, U. S. Code, which reads in part:

> "Any contract, rule, regulation, or device whatsoever * * * to prevent employees of any common carrier from furnishing *voluntarily* information * * * as to the facts incident to the injury or death of any employee, shall be void, and whoever * * * shall attempt to prevent any person from furnishing *voluntarily* such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing *voluntarily* such information to a person in interest, shall, upon conviction * * * be punished * * *." (Emphasis added.)

Obviously this statute would have no application to the instant case. Orlando did not "voluntarily" furnish information. He was paid by defendant to get information.

Respondent's employment of Orlando to work against the interests of his employer, B. & O., so as to benefit respondent and his clients was not an isolated instance. What records respondent was able to produce indicated substantial payments to Orlando in each of five years.

The payment of $4,716 in 1961 was all for work done prior to July 19 of that year.

Respondent now argues that there was nothing wrong with respondent's paying Orlando substantial sums of money to work against the interests of his employer, B. & O., so as to benefit respondent and his clients.

If the respondent did not know that it was wrong to do this, why did he try to cover it up? His testimony that he did this to protect Orlando from charges being made by B. & O. is not convincing testimony that he did not know that this employment of Orlando was wrong.

Why did respondent not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their

income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B. & O. charged Orlando with soliciting cases against it for Ruffalo. In September 1962, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B. & O. and against Ruffalo in the proceedings brought against him.

In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar. He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so.

This is not the first time that respondent's conduct as a member of the bar has been questioned and found improper. After he was found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people" and was disciplined therefor in 1957, he showed a contempt for the court, which made that finding and provided a very

lenient discipline for his misconduct. Although he admittedly was well able to pay costs amounting to several hundreds of dollars and had been ordered by that court to "pay the costs of this proceeding within 30 days," he neglected to make any effort to pay them until shortly before the first hearings in these proceedings more than five years later.

The members of this court are not in agreement as to whether the facts are as the board of commissioners recommended they should be found with respect to some of the other charges against respondent. However, in view of the admitted facts with regard to charges 8 and 13 and the previous judgment of 1957 and the attitude of respondent with respect thereto, we are of the opinion that respondent should be suspended for an indefinite period from the practice of law.

JUDGMENT ACCORDINGLY.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL and KERNS, JJ., concur.

GIBSON, J., concurs in the judgment.

HERBERT, J., dissents.

KERNS, J., of the Second Appellate District, sitting by designation in the place and stead of GRIFFITH, J.

GIBSON, J., concurring. In view of the respondent's right to apply for reinstatement after the passage of two years following the order of suspension, I concur in the judgment of the court. Paragraph 21, Rule XXVII of this court. Because of the nature of the issues decided in the instant case, I believe it desirable to comment briefly upon them.

Since it is evident that basically the court and the board of commissioners treat this as a case of solicitation, the following comments may not be inappropriate.

Although the solicitation of law business does not import venality, criminality, fraudulent practices or moral turpitude, it is inimical to the good reputation of the bar. Solicitation within the meaning of Canon 27 can not be precisely defined in such a way as to apply in every case.

Courts surely are not expected to be ignorant of things that other men well know. Everyone knows that attorneys, for their practice, depend upon friends, clients and former clients, and their activities within the community. Friends, acquaintances, and associates of an attorney have the unquestioned right to praise his legal abilities and to divert to him such clients as they can persuade in a legitimate way to engage his services.

This respondent has pursued the personal injury practice of law successfully and aggressively. We would be naive to say that his enterprise has not occasionally carried him into areas where his activity is subject to criticism. In fact, the record clearly shows that in 1957 he was reprimanded by the Common Pleas Court for unprofessional conduct in soliciting professional employment by and through authorized agents and employees.

Charges No. 8 and No. 9 relate to instances where respondent advanced money to certain clients. Respondent admits that such advances were made but justifies them on the ground that they were made as acts of kindness at a time when these clients were in necessitous circumstances.

Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics. Canon 42 expressly recognizes that a lawyer may in good faith advance expenses of litigation as a matter of convenience but subject to reimbursement. Perhaps an occasional advance or loan by a lawyer to his

client is not proscribed. At best it is a practice which should be followed infrequently and used with extreme caution because it has long been questioned by the courts and the organized bar. It may well be that the advances made by respondent were of such amounts and frequency, and without a sufficiently clear obligation on the part of the clients to reimburse respondent regardless of recovery, that the finding that respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 is proper.

In charge No. 13, the respondent is accused of conspiring with Michael Orlando and paying Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer. The evidence shows that Orlando worked for the railroad from 11:00 p.m. to 7:00 a.m., five days a week, and that the daytime was his own without restriction. There is nothing unethical in the employment of an investigator. It can not be inferred from such employment that the attorney is "ambulance chasing." In fact the board did not find that Orlando had been soliciting claims for respondent. It found instead that respondent was guilty of misconduct because he was a party to a transaction which caused Orlando to breach his duty of loyalty to his employer.

The principle that "an agent can not serve two masters" is well established. Certainly an attorney may not ordinarily represent principals with conflicting interests, *e.g.*, vendor and vendee of property. But here the respondent was a principal or master and not the agent or servant. It would appear that the penalty, if any, for a transgression of the principal should be borne by the agent, Orlando. I fail to find any provision in Canon 29 or Canon 32 which would require that a sanction be applied against the respondent, who merely made it possible for Orlando to attempt to serve "possible" conflicting interests.

HERBERT, J., dissenting. I am unable to join in the judgment entered in this cause, basically, for two reasons: (1) the judgment in substance overrules long recognized and established principles of law in Ohio, to wit, *Roberts v. Montgomery*, 115 Ohio St., 502; *Scheinesohn v. Lemonek*, 84 Ohio St., 424; *Cleveland Ry. Co. v. Godfrey*, 28 O. L. R., 466; and *Reece v. Kyle*, 49 Ohio St., 475; and (2) a recent decision of the Supreme Court of the United States, being *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar* (April 20, 1964), , 84 S. Ct., 1113.

The *per curiam* overrules *Reece v. Kyle*, 49 Ohio St., 475. In that case, Spear, C. J., delivered a scholarly opinion of a unanimous court upon the obstacles that have confronted courts for hundreds of years in Anglo-Saxon judicial history. He pointed out the efforts to throttle the vicious practices of champerty and maintenance but also emphasized the ever-present duty of the courts to protect the weak and dependent from oppression by the powerful. While commenting upon rules necessary to control evils of the past, he warned, in the opinion, at page 487:

> "* * * new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts."

In the case at bar, respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.

For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the dependents,

through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hungry.

People, ex rel. Chicago Bar Association, v. McCallum, 341 Ill., 578, 173 N. E., 827, is a case squarely in point.

There, the facts recited in the opinion are amazing. It is well worth reading. The second paragraph of the syllabus states the law of the case in this language:

> "*Advancing money to indigent client is not against public policy.* The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of a personal injury case and while he is unable to earn anything, may, in a sense, tend to foment litigation by preventing *an unjust settlement from necessity*, but there is no authority holding that it is against public policy and no reason why it should be so considered, *as a man in indigent circumstances thereby may obtain justice where without such aid he would be unable to do so.*" (Emphasis added.)

Under the holding in the case at bar, the doctrine of the *McCallum* case cannot be followed in Ohio.

Charge 13 and the facts in support thereof are quite simple. One Orlando was a yard employee of the Baltimore

& Ohio Railroad. He released the "air" of incoming trains. He had a regular tour of duty. He performed his duties faithfully and well. He was loyal to his employer in his employment. Respondent employed Orlando during some of his off-duty hours and on his own time to interview witnesses and discover the facts and circumstances surrounding episodes wherein clients of the respondent were injured while in the performance of their railroad duties or were killed by reason of the negligence of the employing railroad.

To establish negligence of a railroad causing such an injury or death, witnesses, who thoroughly understand the intricate and complex construction and operation of railroad mechanical devices and equipment, are essential. Such information and such witnesses are necessary to establish a case, for an injured workman or for the dependents of one killed, by testimony by those familiar with railroading and the operation of trains.

Orlando's employment was not in violation of law. It was thoroughly consistent with enactments of Congress, particularly Section 60, Title 45, U. S. Code, referred to in the *per curiam* opinion. This law intended to make available information to injured employees and persons in interest. Without the aid of Orlando or some other well-informed person, the respondent would not have the names of necessary witnesses and would be handicapped severely in the presentation of a case of an injured railroad workman or the dependents of one killed by reason of the railroad's negligence. By his extra work, Orlando helped the injured and the dependents of the dead to secure justice. The *per curiam* says that Orlando was disloyal to his railroad employer, and the respondent was unworthy of being a lawyer because he used witnesses and information secured by Orlando. The respondent was acting under a law

enacted by the United States Congress above mentioned and in furtherance of the administration of justice.

Respondent furnished records to the Internal Revenue Service to show his payments to Orlando in order to deduct the same from his own income tax. It seems to me that records that satisfy the Internal Revenue Service were all that respondent was required to keep. It is said that Orlando was disloyal to his railroad employer by furnishing information and evidence that would compel his employer to respond to the requirements of justice. Orlando was acting in pursuance to and in accordance with a congressional enactment. He was at the same time giving an invaluable service to injured railroad workmen and the dependents of the dead who were represented by the respondent.

> "A state could not, by invoking the power to regulate the professional conduct of attorneys, *infringe in any way* the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." (Emphasis added.) *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar, supra.*

Charge number 13 against the respondent, and the facts offered to substantiate it, appear to me to be clearly contrary to the above-quoted principle of law.

APPENDIX B.

FIRST MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT.

BATTISTI, *J.*:

On May 20, 1964, the Supreme Court of Ohio ordered that Respondent John Ruffalo, Jr., be indefinitely suspended from the practice of law in Ohio. *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263, 199 N. E. 2d 396 (1964). This order became final and effective when, on December 7, 1964, the Supreme Court of the United States denied Respondent's petition for certiorari. *Ruffalo v. Mahoning County Bar Association,* 379 U. S. 931 (1964).

Rule 1(E) of this Court's rules provides in part as follows:

> "E. Disbarment and Discipline. Any member of the Bar of this court may for good cause shown and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper.
>
> "Whenever it is made to appear to the Court that any member of its Bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court, and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within ten days, there shall be entered an order of disbarment, or of suspension, for such time as the Court shall fix.
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> "* * *"

Pursuant to Rule 1(E) it was ordered on January 26, 1965, that Respondent suspend his practice in this Court. It was further ordered that Respondent show cause with-

in 30 days why he should not be disbarred from practice in this Court.

On February 25, 1965, Respondent filed his response to the Order to Show Cause. Shortly thereafter, the Court requested that the trustees of the Mahoning County Bar Association appear before the Court to discuss the matter of the disbarment proceedings. Since the Mahoning County Bar Association had aggressively prosecuted the State disbarment proceedings and was obviously the body most familiar with the facts of the case, it was the Court's feeling that said association should represent the interests of the Bar in these proceedings. A substantial number of the trustees of the Mahoning County Bar Association appeared in response to the Court's request for a meeting. At the meeting doubt was expressed as to whether the Mahoning County Bar Association wished to continue its participation in the matter. Rather, it was suggested that the Mahoning Bar would like to inquire whether the Ohio State Bar Association would appear in the proceedings in this Court.*

By order of the Court, a pretrial conference was set for March 26, 1965, to consider questions concerning procedure, stipulations, a hearing date, and any other matters which might be brought to the attention of the Court. The Mahoning County Bar Association was represented at this pretrial conference by Attorneys Joseph Bryan, James Bennett, Jr., and Paul Smith. The Clerk's minutes of the pretrial hearing show that the Mahoning County Bar Association orally moved to appear *amicus curiae* in these proceedings and that said motion was granted by the Court. The Clerk's minutes further show that the

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* On motion by the Respondent, the Court, on March 10, 1965, modified the Order of January 26, 1965, to allow the Respondent to engage in the office practice of law during the pendency of these proceedings.

following schedule was set for the disposition of these proceedings:

(1) Counsel for the Respondent to file a proposed stipulation of facts by April 2, 1965.

(2) The Mahoning County Bar Association to file a statement of its views with regard to the proposed stipulation of facts by April 9, 1965.

(3) The Mahoning County Bar Association to file a brief in opposition to Respondent's response to the Order to Show Cause by April 16, 1965.

(4) A hearing was set for April 26, 1965.

The Court was informed at this time that Attorney Joseph Bryan would be representing the Bar Association.

On April 3, 1965, Respondent filed his proposed stipulation of facts. On April 9, 1965, the Mahoning County Bar Association filed its objections to Respondent's proposed stipulation. On April 16, 1965, the Mahoning County Bar Association filed its brief in opposition to the Respondent's response to the Order to Show Cause.

Several days prior to April 26, 1965, the Court requested that the parties be contacted to confirm the oral hearing set for April 26. The Court learned in this manner that Attorney Joseph Bryan had withdrawn from the case. Thereafter, upon further inquiry, the Court learned through Attorney Oscar Kaufman, President of the Mahoning County Bar Association, that the Bar Association would appear at the hearing on April 26, 1965, but that it did not wish to offer any arguments.

On April 26, 1965, Attorney Craig Spangenberg appeared before the Court representing the Respondent. Attorneys Oscar Kaufman, Bernard Wilkes, and Charles P. Henderson appeared on behalf of the Mahoning County Bar Association. At the conclusion of Mr. Spangenberg's

arguments, the following colloquy took place between the Court and the representatives of the Bar Association:

"Court: Does the Mahoning County Bar, through its President, Mr. Kaufman, wish to argue?

Mr. Kaufman: As President of the Mahoning County Bar Association, I have been directed by its trustees to say to the Court, in substance, that the Mahoning County Bar Association will waive arguments at this time, and will submit this cause to His Honor based upon the briefs filed in the record.

Court: Now, after this record is typed, I would like an opportunity to review it, together with the briefs that have been filed thus far, for some questions that I wish to be argued before me; and at that time, if I do, the representatives of the Mahoning County Bar Association who have appeared, will be ordered to argue those questions. There are some very serious matters here, which I think need a thorough adverse argument. * * *

Mr. Wilkes: If the Court please, I think it should be made clear that no one of the Mahoning County Bar Association has read the record of the proceedings before the Ohio Supreme Court. We are not at all familiar with the contents of that record.

Court: All right, you have made it clear on the record. I think it should be made clear on the record that the Mahoning County Bar Association has had time to read it, but perhaps not you—those sitting here at the counsel table. There was counsel who represented the Mahoning County Bar Association in this matter before this court, and in the case against Mr. Ruffalo before the trial board, and before the Supreme Court of Ohio and the Supreme Court of the United States, but he is not present here. He was on vacation at the time of the first conference. I think he has since returned.

Mr. Kaufman: I regret I am not able to help to analyze that situation.

Court: I cast no doubt against that particular attorney. I just want the record to show that he is not here and has not carried forward this argument.

I will begin immediately to work on this case, and the reporter will get it to me as quickly as possible.

I do want you to be prepared for additional argument before the matter is completed in this court."

It is readily apparent from the above-quoted comments that the Court was, at the time of the hearing, less than satisfied with the conduct of the Mahoning County Bar in these proceedings. Further, the Court was of the opinion that the Mahoning County Bar Association, acting through its trustees, had failed to responsibly execute its duty to the Court and the Bar. Thus, notwithstanding the fact that the Mahoning County Bar Association aggressively prosecuted the State disbarment proceedings, at no time in these proceedings* had any member appeared on behalf of the Association who appeared to have more than a fleeting knowledge of the facts of the case. Under the circumstances of this case, as will be discussed in greater detail subsequently, the aid of the members of the Bar Association who had knowledge of the facts of the case would have been of invaluable assistance to the Court in the disposition of these proceedings.

Notwithstanding the Bar Association's clearly demonstrated apathy towards these proceedings, a motion was filed in this Court on June 9, 1965, requesting an *en banc* hearing. On June 24, 1965, the Court heard oral arguments on this motion. At the conclusion of these arguments the Court denied the request for an *en banc* hearing.

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* Except for an appearance on the motion for hearing *en banc* which was filed after hearing on the merits.

At the oral hearing on June 24, 1965, the Court granted the Bar Association and the Respondent leave to file further briefs on the issues presented with regard to Charge No. 13. The Bar Association filed its supplemental brief on July 6, 1965, and the Respondent a reply thereto on July 12, 1965.

From a reading of the entire record of the State disbarment proceedings, particularly the testimony of one Charles S. White, an employee of the Association of American Railroads, it seems clear that the genesis of the disbarment proceedings against Respondent was an investigation conducted by agents of the Association of American Railroads. (Tr. 770 to 773.) After the investigation of said Association had been completed, the results were turned over to Attorney Jay Brownlee, then President of the Mahoning County Bar Association.* Some time in 1962, charges were filed against the Respondent by the grievance committee of the Mahoning County Bar Association. These charges involved Respondent's relationship with certain persons contacted and interviewed by representatives of the Association of American Railroads in the course of its investigation of the Respondent.

Originally, ten charges were preferred against Respondent. These charges may be briefly summarized as follows:

Charge 1—That Respondent had failed to pay certain costs assessed against him as a result of early disciplinary proceedings.

Charge 2—That Respondent solicited the employment of one Mrs. Clara Beighley of New Castle, Pennsylvania, in a claim against the Baltimore & Ohio Railroad.

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* It seems appropriate to note that Mr. Brownlee has appeared frequently in this Court as the representative of the B. & O. Railroad; but see, Tr. 774 where this line of inquiry was forbidden.

Charge 3—That Respondent, acting through an authorized agent, solicited the claim of one Mrs. Naomi Clark against the Baltimore & Ohio Railroad.

Charge 4—That Respondent solicited, through an agent, namely, Michael Orlando, the claim of one Sam Cotellesse against the P. L. & E. Railroad.

Charge 5—That Respondent attempted to solicit, through an agent, namely, Michael Orlando, the claim of one James F. Quinn against the Baltimore & Ohio Railroad.

Charge 6—That Respondent personally attempted to solicit the claim of Andrew Buletko against the P. L. & E. Railroad.

Charge 7—That Respondent, through an agent, namely, Louis E. McKinney, solicited the claim of one Mrs. Rakestraw against the Pennsylvania Railroad.

Charge 8—That Respondent advanced certain monies to Mrs. Beighley, Mrs. Clark, and Sam Cotellesse while handling their claims and deducted said advances from settlements of their claims.

Charge 9—That Respondent promised to advance money and later did advance money to one Andrew Masters during the pendency of his case against the Pennsylvania Railroad.

Charge 10—That Respondent was guilty of unprofessional conduct in attempting to influence one Elija Doster in that he endeavored to have Doster sign a false statement that Doster had not been contacted by the Respondent in an effort to have Doster help in the solicitation of the case of Naomi Clark and that at the time Respondent attempted to take said false statement from Doster and he paid him the sum of $50.00 in cash.

In the latter part of 1962, a three-member hearing panel was convened for the taking of evidence and for a report on the charges made against Respondent. During the course of this hearing, four additional charges were preferred against the Respondent. These charges may be briefly summarized as follows:

Charge 11—That Respondent attempted to intimidate Samuel Doster who was to appear before the hearing panel and that Respondent gave said Samuel Doster a fifth of whiskey and $5.00 for the purpose of prevailing upon him to prevent his father from appearing as a witness.

Charge 12—That Respondent, through one or more of his agents acting on his behalf, attempted to intimidate witness Andrew Masters by having his agent offer Masters the sum of $300.00 to keep him from appearing before the panel.

Charge 13—That Respondent conspired with Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer.

Charge 14—That Respondent, through Michael Orlando, solicited the right to represent Amerzia Montgomery and his wife, Mildred Montgomery, in their claims on behalf of their minor daughter, Sheila. As is readily apparent, many of the above-summarized charges are of a most serious character.

The proceedings before the three-member panel were lengthy (the record covering 1033 pages), in part extremely bitter,* and in content extremely extraordinary. The record of the proceedings is replete with charges of actual or attempted intimidation of witnesses. The record

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* See, for example, Tr. pp. 154, 510, 558 and 758.

further contains at least one instance of admitted perjury and other instances where persons obviously perjured themselves.

The alleged misconduct on the part of the Respondent with regard to the proceedings themselves is, in large part, reflected in the charges which have been set out above. The charges or indications of misconduct in the prosecution of the Respondent in large part arise out of the involvement of the Association of American Railroads in the proceedings. Generally, the charges made against the Association of American Railroads relate to intimidation of witnesses and the suborning of perjury.

The involvement of the Association of American Railroads in the proceedings was not insignificant, in fact quite prominent; and, as noted above, it is evident that the disbarment proceedings grew out of an investigation conducted by said Association. It seems equally evident, from a review of the entire record, that representatives of the Mahoning County Bar relied heavily upon the work of the said Association in the prosecution of the Respondent. In fact, throughout the hearing, the Association had the following four representatives present:

> The Assistant Director, J. A. Sherman of Chicago, Illinois;
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> His Assistant, J. V. Lynch of Memphis, Tennessee;
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> Investigator, F. N. Van Luit of Rochester, New York; and
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> Investigator, Charles S. White of Pittsburgh, Pennsylvania.

Were this Court to indulge in innuendo, it would have to conclude that charges made against the Association of American Railroads are credible. To a certain extent the nature of this Association's involvement in disciplinary

proceedings is demonstrated by the following quote from a speech given in 1956 by one Kenneth A. Carney, head of the Claims Research Bureau of the Association:

> "There have been successfully (sic) disbarment proceedings tried in Oklahoma City, in Chicago, in Ohio, and one of the nice things that I like about all of this is that it is being accomplished in such a way that the bar associations handling these matters are convinced that such action is more in their interest than ours. And their selfish interest is aroused to the point where they have thus far carried the load for us in practically every proceeding that has thus far been instituted."
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> (General Claims Division, Association of American Railroads, 67th Annual Meeting, Shamrock-Hilton Hotel, April 18-20, 1956, Houston, Texas, p. 108.)

This organization's conduct has not escaped unfavorable comment by the courts. In *In re Heirich,* 140 N. E. 2d 825, 10 Ill. 2d 357 (1956), the Supreme Court of Illinois made the following comments with regard to the involvement of the Association of American Railroads in the prosecution of one B. E. Heirich:

> "There seems to be no question but what a group of railroads commenced this prosecution and that they hired George Ericksen to prepare the complaint and secure the evidence. This he proceeded to do without a conscience. We are sure that we are not doing violence to this record when we say that Ericksen, in constructing the case against Respondent, was guilty of subornation, bribery, deceit, trickery, entrapment and false impersonation. * * *"

That members of the Association of American Railroads evidently condone the attitude reflected in Mr. Carney's speech certainly does not commend members of

said Association to the admiration of the Bar. While it is an obvious truth that the railroads have, over the years, been unjustly injured as a result of unethical practices of some attorneys, and while it is further clear that the railroads have an absolute right to attempt to remedy such injustices, it nonetheless follows that they should not be permitted to use legal ethics or bar associations as a banner under which to unscrupulously advance their own economic self interests.

Other Courts have in the past and will in the future comment adversely upon any bar association or members thereof who become a party to an effort on the part of any special interest group to serve their own interests by or through disciplinary proceedings against members of the bar. As stated so eloquently by Justice Cardozo in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 162 N. E. 487:

> "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."

In this vein, the comments of the Supreme Court of Missouri in *In re Sizer*, 267 S. W. 922, 924 are very much in point:

> "While the charges are nominally filed by officers of the bar associations, they were clearly induced by the representatives of the corporations aforesaid. The bar associations took up this case at such suggestions. It does not clearly appear in the record, but it can well be inferred from what does appear, that these corporations are financing this case. That they financed Pendell is openly admitted. That they were contributing to a fund at the rate of $50.00 each per month is candidly stated. This much more than paid Pendell and his legitimate expenses. How long these payments were to continue does not appear, but we are but humans, and can draw conclusions from

admitted facts. The evidence further discloses that feelings ran high in Kansas City, and an attempt was made to organize another bar association in that city on the pretense that the then present association officers were men largely engaged in protecting corporation clients from damage suits. These lawyers were largely engaged by plaintiffs in damage suits and they proceeded through their investigators to investigate the defending damage suit lawyers and from dissatisfied clients, the evidence shows many affidavits were obtained against some of them. No action was ever taken upon them, however, and the proposed new association never materialized. Sizer & Gardner had nothing to do with the Kansas City move. It clearly appears that the move first started in Kansas City, as stated above, and finally Sizer & Gardner were made the subjects of investigation before the present action.

"Let us speak plainly, as Courts should speak, and say that every earmark of the evidence in this case shows that it is an effort by corporation lawyers as against what they call damage suit lawyers. All this (true as it may be, and as we think it is) does not change the case. The motive for preferring the charges is of small consequence, if, in fact, the charges are sufficient in law, and the respondents are guilty. So that we can concede a contest (upon the one side) by the defending corporation damage suit lawyers and the prosecuting damage suit lawyers upon the other, and the case yet remains as to the sufficiency of the proof. If the bar associations, sua sponte, had preferred the charges, we would have one background, but where the corporation lawyers of the associations have induced the associations to act upon evidence procured by a special expert, such as Pendell, the background is different. We have to take the picture as it is made to appear. Fifty per from a long list of interested corporations will cover much more than Pendell got for procuring affidavits. Such is a general

outline. In our limited experience at the bar we represented (at different periods) both sides of such cases as are involved here, and we hope not to overdraw inferences from the evidence before us."

At the conclusion of the hearing, the hearing panel found that Charges Nos. 3, 8, 9, 10, 11, 12 and 13 had been proved and that Respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the panel and the record, the Board of Commissioners on Grievances recommended that Respondent be disbarred.

Under the procedures established for disciplinary proceedings, the matter then went before the Supreme Court of Ohio. In *Mahoning County Bar v. Ruffalo*, 176 O. S. 263, 199 N. E. 2d 396 (1964), the Supreme Court of Ohio made this comment with regard to its responsibility:

"In cases of this kind, the Board of Commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts."

On the basis of certain admitted facts, the Ohio Supreme Court, with Judge Herbert dissenting, concluded that Respondent was guilty of a breach of professional ethics with regard to matters contained in Charges No. 8 and No. 13.* The Court made only one brief reference to the other charges made against the Respondent. In the last paragraph of the Per Curiam opinion, the Court stated that:

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* Judge Gibson, in a concurring opinion, expresses considerable doubt as to some of the conclusions reached by the majority.

"The members of this court are not in agreement as to whether the facts are as the Board of Commissioners recommended they should be found with respect to some of the other charges against Respondent. However, in view of the admitted facts with regard to charges No. 8 and No. 13 and the previous judgment of 1957 and the attitude of Respondent with respect thereto, we are of the opinion that Respondent should be suspended for an indefinite period from the practice of law."

It is not surprising that the Supreme Court of Ohio did not, on the basis of the record presented, make findings with regard to the other charges. Where, as here, serious charges of misconduct are made; and, where, as here, those charges substantially affect the credibility of all, or nearly all of the witnesses it would be impossible to make, judiciously, findings of fact without having had the benefit of a personal confrontation with said witnesses.

Since the proceedings in this Court are predicated upon the findings of the Ohio Supreme Court, this Court's consideration will be limited to those charges upon which findings were made by the Ohio Supreme Court.

While, as noted above, the "record" presented to this Court is in many respects distressing, it must nonetheless be noted that the evidence with regard to Charges No. 8 and No. 13 is undisputed and, therefore, untainted by charges and countercharges of misconduct in the prosecution of the State disbarment proceedings. This being so, the evidence with regard to Charges No. 8 and No. 13 must be viewed outside of the shadow cast by the unresolved charges of misconduct.

In *Theard v. United States*, 354 U. S. 278 (1957) the Supreme Court made the following comments relative to federal disbarment proceedings predicated upon disbarment by a state court:

"While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The Court's control over a lawyer's professional life derives from his relation to the responsibilities of a Court. * * *

"Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling v. Radford,* 243 U. S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts."

In *Selling v. Radford,* 243 U. S. 46 (1917) the Supreme Court made the following observations relative to the responsibility of the federal judiciary in cases such as the present:

"In other words, in passing upon the question of the right to continue to be a member of the Bar of this court, we think we should recognize the absence of fair private and professional character inherently arising as the result of the action of the Supreme Court of Michigan so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar. That is to say, we are of opinion that we should recognize the condition created by the

judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear:

1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

Respondent herein urges that the admitted facts do not constitute a sufficient ground for disciplinary action; and, therefore, "under the principles of right and justice" he should not be disbarred from practice in this court.

CHARGE No. 8.

The admitted facts with regard to Charge No. 8 are as follows. Clara Beighley and Naomi Clark were both widowed by the death of their husbands in railroad accidents. Respondent represented both women in actions brought under the Federal Employers' Liability Act. During the period of years in which he represented these women, Respondent from time to time made small advances to both in order that they might meet certain living expenses. The amounts advanced were to be repaid regardless of the outcome of the litigation. Ultimately, the advances were deducted from the proceeds of settlements

of their claims. The advances to Mrs. Beighley totaled $1,025.00 and those to Mrs. Clark totaled $711.00.

In holding that the Respondent acted improperly in making the aforementioned advances, the Ohio Supreme Court made, inter alia, the following observations:

> "Canon 10 provides:
>
> The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.
>
> "Canon 42 reads:
>
> A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement.
>
> "It is clear that the word, 'expenses' appearing after the semicolon refers to 'expenses of litigation.' It would not include advances of the kind admittedly made by respondent for 'living expenses * * * during the period between the filing of and the trial or disposal of the case.' See opinion 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A., Journal 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association v. McCallum* (1930), 341 Ill. 578, 173 N. E. 827, on this question with Canons 10 and 42.
>
> "It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds receiving on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons con-

template that this will be proper only where the advance is for 'expenses of litigation.'" 176 Ohio St. 263, 264, 265.*

In *People, ex rel. Chicago Bar Association v. McCallum*, 173 N. E. 827 (1930), the Illinois Supreme Court made the following comments with regard to the propriety of advancing funds to needy clients:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim. *Christie v. Sawyer*, 44 N. H. 298; *Shapley v. Bellows*, 4 N. H. 355. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we

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* The views expressed by the Ohio Supreme Court are nearly identical to those expressed in opinion No. 288 of the Legal Ethics Committee of the American Bar Association.

are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered. *Johnson v. Great Northern Railway Co.*, 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140; *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999. By canon 42 of the Ethics of the American Bar Association, it is permissible for an attorney to advance costs and court charges for his client, with the understanding that the same are to be ultimately paid by the client."

As the Ohio Supreme Court has itself noted, the above-quoted portion of the Illinois Supreme Court's opinion in *People, ex rel. Chicago Bar Association v. McCallum, supra,* may not be reconciled with the Ohio Supreme Court's per curiam opinion in *Mahoning County Bar Association v. Ruffalo.*

In *McCallum,* as in *Ruffalo,* reference is made to Canon 42. That canon provides as follows:

"A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

As the portion of Canon 42 preceding the semicolon provides, an attorney may not properly agree to pay or bear the expenses of litigation. See: *Peck v. Heurich,* 167 U. S. 624 (1897), *Watkins v. Sedberry,* 261 U. S. 571 (1923). As may readily be noted, Canon 42 further provides, however, that such expenses may be advanced *subject to reimbursement.*

It seems clear that Canon 42 in its entirety is concerned solely with the specific matter of expenses such as court costs, etc., and not with "living expenses" of the client. In providing that an attorney may, under certain circumstances, properly advance expenses of litigation,

Canon 42 neither implicitly nor explicitly provides that advances which are subject to reimbursement, but which are made for other purposes, are otherwise improper.

In *Ruffalo*, the Ohio Supreme Court, after concluding that the advances in question in effect constituted the purchase of an interest in the subject matter of the litigation, then went on to say that such a "purchase" is proper only to the extent that it covers expenses of litigation. In this Court's opinion, the canons provide no exception to the prohibition contained in Canon 10. To say that the latter portion of Canon 42 provides an exception to Canon 10 in effect is to say that Canon 42 contemplates that any advances subject to reimbursement, including advances of the expenses of litigation, constitute a purchase of an interest in the subject matter of the litigation. In this Court's opinion, such a construction is entirely unwarranted. As the Court has already noted, that portion of Canon 42 following the semicolon merely provides that advances of the expenses of litigation subject to reimbursement are proper, and in no manner indicates that they are otherwise improper. As will subsequently be noted, this is not to say, however, that under all circumstances advances subject to reimbursement are actually proper.

In *McCallum*, the Illinois Supreme Court does not say that the advances there involved were specifically justifiable under Canon 42. Rather, the Court appears merely to be making an analogy between the advances it was considering and the advances authorized by Canon 42.

In holding that the Respondent herein purchased an interest in the subject matter of the *Beighly* and *Clark* litigation, the Ohio Supreme Court did not hold that all loans to clients are improper. In this regard, the comments of the Connecticut Supreme Court in *Grievance Committee*

of Fairfield County Bar. v. Nevas, 139 Conn. 660, 666-667, 96 A. 2d 802, 805 (1963) appear to be most pertinent:

> "By loaning money to his client, the defendant put himself in a position where his personal interest might well become adverse to hers. The making of such a loan by a lawyer is not, however, necessarily unethical conduct. It is unethical only if the loan is made to accomplish some purpose contrary to the client's welfare or if, in seeking repayment, the lawyer pursues practices which are unfair or unduly oppressive."

Other courts have reached the same conclusion. See: *Hildebrand v. State Bar*, 18 Cal. 2d 816, 824; 117 P. 2d 860, 863-864 (1941); *Mytton v. Missouri Pacific Railroad Co.*, 211 S. W. 111 (1919); *State ex rel. The Florida Bar v. Dawson*, 111 So. 2d 427, 430 (1959); and see, also, *Mahoning County Bar Association v. Ruffalo*, concurring opinion by Gibson, J.:

> "Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics."

This Court concludes that the practice of making loans to clients is not *per se* unethical.

While it would be unethical to promise to make loans in an effort to obtain a prospective client's business, or to accomplish a purpose contrary to the client's interest, or to use unfair tactics in seeking repayment, no such contention was made in the instant case.

The record in this case does not indicate that Respondent was engaged in a wide scale practice of making substantial loans to a large number of his clients. On the contrary, the evidence indicates that Respondent made loans to relatively few clients; that the loans were made after the clients had retained Respondent to represent

them; that the loans were made at the request of the client; and that the amounts of the loans were, considering the period over which they were made, not substantial in amount. Under these circumstances, it would be unreasonable to find that the making of these loans by the Respondent constituted a practice calculated to solicit employment by others or as a gimmick to unethically advertise his services.

The question remains as to whether, under the circumstances, the advances in question constituted a purchase of an interest in the subject matter of the litigation. In this regard, it must be noted that the evidence to the effect that the clients had an unconditional obligation to repay the advances is as uncontroverted as the fact that the loans were made. In finding that the advances in question "in effect" constituted a purchase, the Ohio Supreme Court did not find that the obligation of Respondent's clients to repay the advances was in any manner conditional. Rather, the Court merely stated that:

> "* * * Where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting."

The record of the State disbarment proceeding does not contain any direct evidence relative to the ability of Mrs. Beighly and Mrs. Clark to repay the amounts advanced by Respondent out of funds other than those received on trial or settlement of their claims. The record does indicate, however, that at the time the advances were made,

said clients were probably in a desperate financial condition. Under these circumstances, it would seem reasonable to infer that it might have been most difficult for the clients to repay the advances out of funds other than those obtained from the trial or settlement of their cases. It may not, however, in this Court's opinion, be reasonably inferred under these circumstances that it would have been impossible for the clients to repay the advances out of funds which might subsequently have become available from sources other than the trial or settlement of their cases.

It is not in consonance with this Court's concept of justice or the underlying purposes of the Canons of Professional Ethics that a loan otherwise proper is rendered improper because of the indigency of the client. In *Reece v. Kyle,* 49 O. S. 475; 31 N. E. 747, 750, the Ohio Supreme Court made the following comments:

> "* * * Beyond this, the propriety of accepting compensation by way of a fee contingent upon the event of the suit, and payable out of the thing recovered, has been recognized. Also the advancing by the attorney, for the benefit of the client, of funds in payment of costs and necessary incidental expenses. Indeed, such advances by the attorney in the progress of litigation, is so common that to denounce the practice as improper would be to condemn the daily acts of the most honorable members of the profession. *Wylie v. Coxe,* 15 How. (U. S.) 415; *Stanton v. Embrey,* 93 U. S. 548; *Allard v. Lamirande,* 29 Wis. 502; *Newkirk v. Cone,* 18 Ill. 449; *McDonald v. Railroad Co.,* 29 Iowa 171; *Quint v. Mining Co.,* 4 Nev. 304. This upon the idea of duty on the part of the profession to investigate the claims, and give professional aid in redressing the wrongs of the indigent who have been injured, for in this way many poor people are enabled to obtain justice, where, without such aid they would be rem-

> ediless. And it has been considered that there is no practical distinction between such an arrangement and one where counsel undertake, for an agreed fee, to be paid in the future, the prosecution of a case for a client so poor that unless the cause be gained the attorney could not possibly realize any compensation whatever. That a contract of the latter kind is legal was held in *Moore v. Trustees,* 9 Yerg. 115. * * *"

In its opinion in *Ruffalo,* the Ohio Supreme Court, after noting that *Reece v. Kyle, supra,* was decided prior to its adoption of the Canons of Professional Ethics made the following comment:

> "In view of the adoption of the canons, those cases (including *Reece*) would no longer be applicable to the extent that they are inconsistent with the provisions of the canons."

It appears that under Canon 42 the contract which was before the Ohio Supreme Court in *Reece* might well be now technically improper. It does not appear, however, that the reasoning in *Reece* relative to the problems presented in cases involving indigent litigants is in any manner inappropriate or in conflict with the Canons of Professional Ethics.

In his dissenting opinion in *Ruffalo,* Judge Herbert makes the following pertinent comments relative to the problems confronting the indigent litigant:

> "In the case at bar, Respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.
>
> "For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the de-

pendents, through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

"The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimants.

"Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hunger."

In Section 542 of the *Restatement of Contracts*, the following illustration is set forth:

Illustration No. 2.

"A, an attorney at law, undertakes to prosecute a claim of B, a poor person who has been hurt in an accident. B promises that A shall have one-fourth of the recovery as his fee. A does not agree to pay the expenses of enforcing the claim but knows that he will have to advance the money needed, since B is without funds. The bargain is not illegal, and A may retain from the amount recovered the agreed fee and also the expenses of enforcement of his claim."

The above-quoted illustration from the *Restatement of Contracts* merely reflects the traditional attitude of fairness which the courts have taken toward the relationship between attorneys and indigent clients, and is thoroughly consistent with Canon 42.

Whether it be the attorney's fee, the expenses of litigation, or unconditional loans, the fact that it might be difficult or unlikely that the client will be able to reimburse

the attorney for the same absent a recovery on his claim should not render the attorney's conduct improper. While the Mahoning County Bar Association has urged that a different approach must be taken with regard to loans, it has not presented, nor can this Court discern, any reasonable basis for taking a different approach with regard to the same. The Court finds that the advances made by the Respondent did not constitute the purchase of an interest in the subject matter of the litigation in violation of Canon 10. The Court further finds that the conduct of the Respondent with regard to such advances was not in any other respect improper. Therefore, the conduct complained of does not constitute a ground for disbarment from practice before this Court. To the extent that the Ohio Supreme Court's views in *Ruffalo v. Mahoning County Bar Association* are different than those expressed herein, the Court respectfully disagrees with the same and declines to follow them.

CHARGE NO. 13.

From 1957 until 1961 Respondent employed one Michael Orlando as an investigator, paying him as follows:

1957	$2950.00
1958	1250.00
1959	1237.37
1960	3829.25
1961	4716.00

During this same period Orlando was also employed by the Baltimore & Ohio Railroad as a car bleeder, that is to say, he was responsible for bleeding air out of train brakes. His hours of employment for the Baltimore & Ohio Railroad were from 11:00 p.m. to 7:00 a.m. His hours of employment for Respondent were during the daytime when he was not employed by the Baltimore & Ohio Railroad.

While Respondent admits that Orlando spent some of his time during the five-year period (1957-1961) investigating cases involving the Baltimore & Ohio Railroad, there is no evidence to indicate what percentage of time he was so employed.

It was noted at the outset that among the original charges brought against Respondent were those to the effect that Respondent employed Orlando to solicit cases, and it was further noted that it was not surprising that the Supreme Court of Ohio made no findings with regard to those charges. Almost at the very beginning of the State disbarment proceedings (Tr. 27) the matter of Orlando's employment by Respondent and the adequacy of his payment records were first inquired into, and the same continued to be inquired into from time to time throughout the trial. This line of questioning, the testimony elicited thereon, and the exhibits used were relevant only insofar as they tended to support the solicitation charges. However, much later in the proceedings (Tr. 656 et seq.) members of the hearing panel inquired of Respondent as to the propriety of employing a railroad employee as an investigator in cases where the railroad employer was a party. The inquiry by the panel members in this regard was rather esoteric in nature because they did not inquire into the duties or circumstances of Orlando's employment in any of the cases involving the Baltimore & Ohio Railroad and Respondent's claimants. In any event, in the middle of this colloquy (Tr. 662) counsel for the Bar Association, *relying only on the evidence admitted up to that point* (Tr. 671, 672), moved to add an additional specification, charging Respondent as follows:

> "That Respondent did conspire with one, Michael Orlando, and paid said Michael Orlando moneys for

preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all the periods of time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company."

The panel, over vigorous objection of the Respondent on the grounds of timeliness and surprise, allowed the additional charge. Thus the "evidence" introduced on the solicitation charge (which the Ohio Supreme Court, in substance, dismissed) suddenly, without notice, and at least half-way through the trial became relevant to a wholly new charge not theretofore contemplated by any of the the parties. The charge Respondent faced at this juncture was one of "conspiracy" to engage in a "deceptive practice" which is "morally * * * and legally wrong as respects the employee, Michael Orlando, toward his employer, the Baltimore & Ohio Railroad."

Notwithstanding the fact that no evidence was admitted to prove that Respondent's employment of Orlando encouraged or resulted in any actual conflict of his duties owed to the Baltimore & Ohio Railroad, this added charge constituted one of the two grounds on which he was indefinitely suspended from the practice of law in Ohio.

At the outset of discussion on this basis for disbarment, it must be noted that the employment of an individual to do work in any manner related to the operations of that individual's regular employer is a practice which might well be fraught with difficulties, and that the regular employer might well be sensitive in this regard. In the present case it is clear that Respondent realized that the Baltimore & Ohio Railroad might cast a jaundiced eye towards Orlando's employment by Respondent to the

extent that it involved investigation of cases to which it was a party. Under these circumstances, it might have been the soundest and most appropriate course of action for the Respondent to have limited Orlando's investigative work to cases other than those involving the Baltimore & Ohio Railroad.

While this Court believes that Respondent might not, under these circumstances, have employed the soundest and most appropriate course of action, the question remains as to whether the course of action which Respondent did follow constitutes a ground for disbarment for practice before this Court.

There need be no citation of authority for the principle that an attorney may not, under any circumstances, employ an individual to do work contrary to or in violation of a fiduciary duty that said individual owes to another party. This general principle of law is manifestly inapplicable to the instant case because Orlando clearly owed no fiduciary duty to the Baltimore & Ohio Railroad. Rather, his employment by the Baltimore & Ohio Railroad was of a most menial nature.

The record of the State disbarment proceedings contains very little evidence relative to the exact nature of the activities of Orlando as an investigator for Respondent. The evidence with regard to Orlando's activities as an investigator is summarized in the following statement made by the Respondent:

> "His job specifically has been to investigate cases which I turn over to him to investigate particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge and the operation of railroads, and on occasion to transport witnesses for me." (Tr. 765.)

There is no evidence, nor is there any claim made, that Orlando trespassed upon Baltimore & Ohio Railroad property to obtain information relative to cases involving the Baltimore & Ohio Railroad.* Further, there is no evidence, nor is there any claim made, that Orlando used surreptitious means in order to obtain confidential information held by the Railroad, or, for that matter, that Orlando in any other manner obtained such information. See, *In Re Noell*, 234 Mo. App. 1162, 96 S. W. 2d 213 (1936); and *In Re Newell*, 174 App. Div. 94, 160 N. Y. S. 275 (1916).

It is noteworthy that Respondent did not hire Orlando specifically to investigate cases involving the Baltimore & Ohio Railroad. Rather, he hired Orlando to investigate all of his railroad cases. This factor, it would seem, substantially negates any contention that Respondent's employment of Orlando was for the purpose of taking unfair advantage of Orlando's status as an employee of the Baltimore & Ohio Railroad.

As noted above, the employment of an individual to do such investigative work may well be a matter towards which the regular employer will be sensitive. However, in judging the conduct of an attorney the Court must consider the sensitivities and interests of all parties without subservience to any of them. Here we have under attack the conduct of an attorney in his effort to serve the interests of his clients. In the preparation of litigation, counsel for both sides necessarily engage in conduct towards which the other side will be sensitive. This is to be expected in adversary proceedings. Where an attorney is charged with

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* In *Ry. Clerks v. Atl. Coast Line RR Co.*, 154 F. Supp. 71, aff'd., 253 F. 2d 753. It was held that a railroad employee may properly be discharged where he allows an investigator to trespass upon company property in order to obtain pictures to be used in litigation against the railroad.

acting contrary to the interests and sensitivities of an opposing party, it would seem that the ultimate and paramount question is not whether the conduct is contrary to the private interests of the opposing party, but, rather, whether the attorney has taken unfair or unethical advantage of the opposing party. In the present case it, therefore, must be determined whether, under the evidence presented, it has been shown that Respondent, by employing Orlando, took unfair advantage of the Baltimore & Ohio Railroad.

Litigation by its very nature often results in an estrangement of traditional loyalties. Thus, where an employer and an employee become involved in litigation, their respective interests may be diametrically opposed. Both the employer and employee may well believe that the other has taken an unreasonable position, and that in the taking of such an unreasonable position there has been a breach of a mutual duty of fidelity. Even though both parties may be proceeding in the utmost of good faith, such feelings often may not be avoided.

In the investigative aspect of litigation, traditional loyalties are likewise to be strained or distorted. This difficult problem has to a certain extent been met by various legal doctrines adopted by the courts, statutory provisions, and rules of ethics. For example, the various common law and statutory "privileges" have a most significant effect in this area. Rules of ethics, such as Canon 39 of the Canons of Professional Ethics, likewise have a significant effect. That canon provides:

"Witnesses

"A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In so doing, however, he should

scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

Further, Section 60 of 45 U. S. C. A., a statutory provision which has been the subject of much discussion in this litigation, clearly meets the possible problem of a distorted concept of loyalty. That section provides:

"Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

"If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby."

It would be a work of supererogation to review all statutory or legal doctrines which, either directly or tangen-

tially, bear upon the problem under consideration. Suffice it to say that the above-mentioned statutory and judicially adopted doctrines are representative of those which bear upon the problem.

It has been a long-standing and accepted practice for corporations to employ persons to investigate claims which their fellow employees have made against their common employer. It is also a long-standing practice for these investigators to aid both inside and outside counsel in litigation which results from such claims. Surely an employee-claimant may personally consider that the employment of such an inside investigator and his use by the corporation's attorneys is not in consonance with mutual duties of fidelity existing between his employer and him, and between fellow employees. Notwithstanding mutual duties of loyalty, it is clear that the practice of employing such an investigator and the use of his services by the corporation's attorneys is proper.* The essential justification for such a practice is that the ultimate purpose of the adversary system (both investigation and litigation functions) is to secure the truth, and, thus, justice. To use the concept of loyalty to preclude efforts to secure the truth is, with certain limitations, a policy which may not be justified.

While the ultimate goal of the investigative function is to secure the truth, it would be naive to even suggest that investigators employed by corporations are always unbiased and objective in their investigation of a particular matter. This fact has not, however, and should not be used as a basis for holding that practice of employing such investigators and the use of their services by a company's attorneys is improper in that it might not always

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* It should go without saying that the same principle applies in many areas of the employer-employee relationship.

result in its salutary purpose—the truth. Rather, courts have condemned the practice only where it has been shown that it has been unfairly and immorally used.

As indicated above, where an attorney, in representing the interests of his clients, employs as an investigator an individual who is also employed by a party against whom his clients are making claims, it might well be that said other party will consider the employment of its employee and his use by the attorney as not in consonance with the employee's duty of fidelity. This is not unlike the feeling which an employee might experience when his employer and its attorneys used one of his fellow employees to investigate a claim which the employee has made against his employer. Since the latter practice has never been considered to be *per se* improper, consistent logic dictates that the former practice likewise must not be considered to be *per se* improper. The salutary purpose and the justification for both practices is that they are directed towards the ascertainment of the truth. That both practices are open to abuse is manifest. The point is that while neither practice is *per se* improper, the abuse of either is clearly improper.*

In *Mahoning County Bar Association v. Ruffalo, supra,* the majority opinion seems to take the position that it is *per se* improper for an attorney to employ as an investigator an individual who is also employed by a party against whom his clients are making a claim regardless of that employee's duties for either employer. This Court considers that position to be erroneous and, therefore, respectfully refuses to follow the same.

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* During the oral arguments held on April 29, 1965, the Court asked certain questions relative to the principles which have just been discussed. In its brief which was filed after these arguments, the Mahoning County Bar Association completely avoided any discussion of the same.

In light of what has been stated above, the Court finds that Respondent's use of an employee of the Baltimore & Ohio Railroad to investigate cases involving said Railroad was not a practice which was *per se* improper. Notwithstanding the fact that the practice is not *per se* improper, the question arises as to whether it has been shown by competent evidence that Respondent's use of Orlando was otherwise improper. Again, the only evidence with regard to Orlando's actual activities is adequately summarized in the following testimony of the Respondent:

> "His job specifically has been to investigate cases which I turn over to him to investigate particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge and the operation of railroads, and on occasion to transport witnesses for me." (Tr. 765.)

There is no evidence or claim made that Orlando had a fiduciary duty to his employer and that Respondent caused a breach thereof. On the contrary, it is clear that no such fiduciary relationship existed. There is no evidence or claim made that the Respondent either caused Orlando to perform work for the Respondent during the hours when he was employed by the Railroad or that Orlando actually did such work during these hours. There is no evidence or claim made that Respondent either caused Orlando to trespass upon the property of the Baltimore & Ohio Railroad in order to obtain information for Respondent, or that Orlando actually did so trespass. There is no evidence or claim made that Respondent caused Orlando in any manner to influence the testimony of any persons whom he interviewed, or that Orlando actually did attempt to influence such testimony. Further, there is no evidence or claim made that Respondent in any other manner

caused Orlando to take unfair advantage of the Baltimore & Ohio Railroad in the performance of his duties as an investigator, or that Orlando so did.*

This Court is of the opinion that the evidence is entirely insufficient to support a finding that Respondent caused Orlando to engage in unfair and unethical practices in the actual investigation of Respondent's cases. Moreover, no contention has been made in this specific regard.

As has previously been noted, the majority opinion in the *Mahoning County Bar Association v. Ruffalo,* in effect, holds that the employment of Orlando was *per se* improper. During the course of the State disbarment proceedings, Respondent stated that he did not keep detailed records relevant to Orlando's employment for the reason that he feared that the Baltimore & Ohio Railroad might be sensitive towards Orlando's employment by Respondent. In holding that the employment of Orlando was *per se* improper, the Court stated that notwithstanding Respondent's claim that such employment was not *per se* improper, the testimony relevant to Respondent's efforts to protect Orlando showed that he knew such employment was actually improper. This Court, having found that Respondent's conduct was not *per se* improper, and no contention having been made or direct evidence offered that Respondent caused Orlando to engage in unfair and unethical conduct in the actual investigation of Respondent's cases, it may not reasonably be found, on the basis of Respondent's statements to the effect that he was trying to protect Or-

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* Again, it should be noted that while Respondent was charged with using Orlando to solicit cases, the Ohio Supreme Court did not make findings with regard to said charges; and that this Court will not, under the circumstances previously discussed, make findings with regard to said charges either directly or indirectly.

lando, that Orlando, in effect, acted unfairly or unethically in the actual investigation of Respondent's cases.

This Court finds that Respondent has, under the principles enunciated by the United States Supreme Court in *Selling v. Radford, supra,* shown cause why he should not be disbarred from practice before this Court.

At the present time disbarment proceedings against the Respondent are pending in the Sixth Circuit Court of Appeals. Since the issues raised in the Sixth Circuit Court of Appeals are identical to those raised here, a final order will be deferred pending a decision by that Court. In the meantime, an order will be entered restoring Respondent to practice before this Court. In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings. Otherwise, a final order will be entered consistent with conclusions reached in this memorandum opinion.

APPENDIX C.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided December 29, 1966.)

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

O'SULLIVAN Circuit Judge. Upon the Supreme Court of Ohio's certification to us that respondent John Ruffalo, Jr., had been indefinitely suspended from the practice of law, we ordered that "John Ruffalo, Jr., show cause if any he has, on or before May 12, 1965, why he should not be stricken from the roll of counsel of this Court."

After extensions granted at the request of respondent, we received his response and brief, as well as a brief amicus curiae by the Ohio State Bar Association in support of the Ohio Supreme Court's order, and the cause has now been argued to a panel of this Court.

In 1962, the Mahoning County Bar Association filed with the Ohio Board of Bar Commissioners on Grievances and Discipline, charges of professional misconduct against respondent Ruffalo. The said Board is made up of seventeen members of the Ohio Bar, chosen, one each, from Ohio's seventeen judicial districts. They are appointed by the Supreme Court of Ohio, pursuant to its Rule XXVII (1) and (3),[1] 167 Ohio St. lxxvii, and act as an arm of that Court.

Fourteen alleged instances of misconduct made up the charges against respondent. The Board of Commissioners convened a panel of three of its members to take evidence on these charges and make an initial report. The charges covered generally acts of solicitation of FELA cases, main-

[1] Now Rule XVIII (1).

tenance of persons asserting claims, attempted bribery, and hiring a railroad employee, Michael Orlando, to act as an undercover agent to assist Ruffalo in soliciting and investigating cases against various railroads, including Orlando's employer, the B & O Railroad.

The panel conducted hearings which extended from December 26, 1962, to August 16, 1963, testimony taken comprising 1,034 pages of transcript. The panel report sustained seven and dismissed seven of the charges. It was unanimously adopted by the seventeen member Board of Commissioners. The charges sustained involved solicitation, maintenance of clients, attempted bribery to dissuade a witness from testifying against Ruffalo, and the use of Orlando as an undercover agent.

The Findings of Fact, Conclusions and Recommendation of the Board were returned to the Ohio Supreme Court. The Recommendation of the Board was that "Respondent be disbarred." The Ohio Court sustained charge 8, maintenance of clients, and 13, use of the undercover agent Orlando. It gave judgment that Ruffalo "be suspended for an indefinite period of time from the practice of law." *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263 (1964). Certiorari was denied by the Supreme Court of the United States. *Ruffalo v. Mahoning County Bar Association,* 379 U. S. 931 (1964). Five members of the Ohio Court joined in the majority opinion, a sixth member concurred in the result, and the seventh dissented. As to five of the charges sustained by the Board of Commissioners covering solicitation, and attempted bribery to dissuade a witness from testifying against Ruffalo, the Ohio majority said,

> "The members of this court are not in agreement as to whether the facts are as the Board of Commissioners recommended they should be found with respect to some of the other charges against respondent."

In deciding that Ruffalo should be suspended from practice, the Ohio Court, in addition to its consideration of the current charges, recited and took into account the fact that in 1957 Ruffalo had been found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people."

Following the Ohio Supreme Court decision, the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to its own rule, commenced an inquiry as to the fitness of Mr. Ruffalo to continue as a practitioner in that Court. The District Judge had before him the record and proceedings which culminated in the decision of the Ohio Supreme Court. He disagreed, however, with that decision and refused to suspend Ruffalo from practice in the District Court. *In re Ruffalo,* 249 F. Supp. 432 (N. D. Ohio, E. Div. 1965). However, he withheld the entry of a final order, reciting that "In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings." The matter before us is not an appeal from the said District Court, but is our own consideration of Ruffalo's standing as a practitioner in this Court.

We should preliminarily observe that our own Rule 6(3), prior to recent amendment, could be read as automatically striking from our roll of counsel the name of any lawyer disbarred in any court of record. It has been amended and we consider this matter in keeping with the requirements and admonitions of *Theard v. United States,* 354 U. S. 278, 1 L. Ed. (2) 1342 (1957) and *Selling v. Radford,* 243 U. S. 46, 61 L. Ed. 585 (1917). These decisions forbid Federal Courts from acting in total reliance on a state judgment. We have before us, and have re-

viewed, the entire record developed by the Ohio proceedings, but think it proper to dispose of the matter primarily upon the charges on which the Ohio Court disciplined Mr. Ruffalo.[2] The facts as to these are not in dispute. We consider whether we find insupportable the Ohio Court's determination that such facts disclosed unprofessional conduct warranting the discipline imposed and whether they warrant similar discipline by us.

The facts as to charge No. 8 are that Ruffalo, during the pendency of their FELA cases, advanced living expenses to three clients. This conduct was found to offend Canons 10 and 42 of the Canons of Professional Ethics. Canon 10 declares that:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

and Canon 42 provides that:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

On this subject, we set out the following extract from the Findings of the Board of Commissioners:

> "While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in

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[2] Our failure to discuss them should not be construed as indicating that we disagree with or find unreliable the other findings of the Board of Commissioners. We cannot accept a contrary assertion in the dissenting opinion. We set out as an appendix hereto the Board of Commissioners' reports on charges 3, 8, 9, 10, 11 and 12, all of which were sustained. The appendix does not cover charge 13 inasmuch as we discuss it at length herein.

that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyer for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testimony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him."

The Supreme Court of Ohio, in agreement with Opinion No. 288 of the Professional Ethics Committee of the American Bar Association, 41 A. B. A. Journal 33 (Jan. 1955)[3] expressed its view that,

"It is obvious that where the advancement of living expenses is made, as in the instant case, to enable a client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The

[3] The late Shackelford Miller, Jr., then, and until his death, a judge of this Court, was a member of, and concurred in the opinion of, the Professional Ethics Committee of the ABA (Opinion No. 288).

canons contemplate that this will be proper only where the advance is for 'expenses of litigation.' "

In the case of *Dombey, et al. v. Detroit, Toledo & Ironton Railroad*, 351 F. (2d) 121 (CA 6, 1965) we recognized the Ruffalo opinion as apparently announcing the law of Ohio, albeit that it appeared to overrule earlier Ohio decisions. While we are not here required to follow Ohio law, we have thus been made aware of the thinking of its Bar and Supreme Court. The bar of Ohio, acting under its laws and the control of the Supreme Court of that state has a responsibility to maintain the prestige and integrity that should, without exceptions to expediency, be marks of a profession of which we also are members. We may, therefore, give respect to the product of its effort to arrive at and express conceptions as to what is and what is not unprofessional conduct by any Ohio lawyer whom we have admitted to practice before us.

We need not, and do not, announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. We do not reach that question. We are satisfied that with Ruffalo's previous conviction in 1957 of solicitation, and the conduct making up Charge 13, there is sufficient to permit us, consistent with "principles of right and justice," to "allow the natural consequences of the judgment [of the Supreme Court of Ohio] to have their effect * * *," *Selling v. Radford*, 243 U. S. 46, 51, and strike Mr. Ruffalo's name from the roll of counsel admitted to practice in this Court.

The admitted facts of Charge No. 13 are that Ruffalo, apparently a specialist in FELA cases, hired Michael Orlando, an employee of the Baltimore & Ohio Railroad, to act under cover as his agent in investigating cases against various railroads. This undercover work included in-

vestigating and obtaining evidence to be used in Ruffalo's cases against Orlando's own employer, the B & O. The employment extended from 1953 to July 19, 1962, when Orlando was suspended by his railroad employer for allegedly soliciting claims (presumably on behalf of Ruffalo). Ruffalo paid Orlando $25 per day, plus expenses for his work, which was carried on outside of Orlando's regular working hours as a railroad brakeman. Through the years 1957 to 1961 this amounted to a total of $13,982.62, of which $4,176 was paid within the first six and one-half months of 1961. This information had to be obtained from the Internal Revenue Form 1099 withholding slips. No other records were available as Orlando was paid in cash, giving receipts to Ruffalo therefor. Regular entries of these transactions were not made in Ruffalo's books and in response to the panel's subpoena to produce his relevant records, Ruffalo testified that whatever writings had been made were destroyed by him as soon as his income tax returns for 1962 and prior years had been examined by the Internal Revenue Service. The Ohio Court's opinion covers this subject in detail and we recite this much of it:

> "The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961 and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *."

The Court's opinion quotes from Ruffalo's justification for the minimal record keeping and the destruction of whatever records had been made as follows:

> " 'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.' " 176 O. S. 266.

The Ohio Court's reaction to the foregoing is portrayed by this excerpt:

> "The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B & O charged Orlando with soliciting cases against it for Ruffalo. In September 1962, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclu-

sion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B & O and against Ruffalo in the proceedings brought against him." 167 O. S. 268, 269.

Its view that Ruffalo's conduct disqualified him for practice at Ohio's bar is thus expressed:

"The panel questioned the respondent at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages of having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *'." 176 O. S. 266, 267.

* * * * *

"In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar. He is even less qualified if he does so when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so." 167 [176] O. S. 269.

The rules which should guide us here come from *Theard v. United States*, 354 U. S. 278, 1 L. Ed. (2) 1342 (1957); and *Selling v. Radford*, 243 U. S. 46, 61 L. Ed. 585 (1917). In *Theard*, the Supreme Court remanded a disbarment case to the District Court which had disbarred an attorney on the assumption that a decision of the Supreme Court of Louisiana foreclosed independent inquiry by the United States District Court.

The disbarment of Theard took place some eighteen years after the charged misconduct—the forgery of a promissory note—notwithstanding the fact that it was found that at the time of the forgery Theard "was suffering under an exceedingly abnormal condition, some degree of insanity," and notwithstanding that after release from an insane asylum and restoration to capacity he had for six years practiced law, arguing numerous cases before the Supreme Court of Louisiana without any charge of misconduct or impropriety.

This factual dissimilarity with the case before us is not of controlling significance, but does make quite understandable the Supreme Court's insistence on a Federal Court weighing the validity of the state court's conclusions. Mr. Justice Frankfurter, writing the *Theard* opinion did observe, however, that:

> "If the accusation rests on disbarment by a state court, such determination of course *brings title deeds of high respect.*" (Emphasis supplied.)

and emphasized that recognition should be accorded a state court judgment subject, however, to the rule expounded in *Selling v. Radford,* 243 U. S. 46, 61 L. Ed. 585. In that case the Supreme Court allowed an attorney who had been disbarred by the Michigan Supreme Court to show cause why he should not be disbarred in the United States Courts by bringing the record of the state court proceedings before it and filing a brief. That opportunity has been afforded Ruffalo here, and we have followed the rule of *Selling v. Radford,* which we quote:

> "[W]e should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, *that there was*

such an infirmity of proof as to facts found to have established the want of fair private and professional character on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so." 243 U. S. 46, 50, 51, 61 L. Ed. 586, 587, 588. (Emphasis supplied.)

Obedient to that rule, we have formed our own judgment, not, however, unconscious of the fact that six judges of the Ohio Supreme Court and seventeen lawyers of the Bar of Ohio, of such standing as to be selected to serve on the Board of Commissioners on Grievances and Discipline, have, after fair procedure, concluded that Mr. Ruffalo's conduct called for his suspension from practice. We do not find in the record of the state proceedings, "Such an infirmity of proof as to the facts found to have established the want of * * * [Ruffalo's] fair private and professional character" to lead us to a conviction that we cannot, consistent with our duty, "accept as final the conclusion" of the Supreme Court and the Ohio Bar.

Able and distinguished counsel have urged us, on the merits, to disagree with Ohio's assessment of the facts now before us. We consider this matter as judges, but we are aware that we are also members of the bar, sharing with our fellow lawyers a just pride in our profession and we are properly concerned that the legal profession be worthy of the respect that it asks today's society to accord it. We have a responsibility not only to Mr. Ruffalo but also to the prestige of our own court. We cannot find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence

and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be a mark of a lawyer. Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this Court had, and have, the right to draw inferences as to what this conduct portrays. The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?

Respondent argues that the Association of American Railroads was guilty of questionable practice in investigating the misconduct of Orlando and Ruffalo and that the American railroads historically have unfairly resisted and impeded the presentation of claims by their injured employees. Unless we are ready to announce a rule that a lawyer may fight on any level chosen by his adversary, we are not here required to pass on such charges. With the liberal use of our discovery practice, we consider that adequate preparation can be made without resorting to the methods chosen by Mr. Ruffalo. We do not believe we should tell today's society that notwithstanding the respect we ask it to give us as a profession of skillful and high minded men, we do not have the ability to adequately represent our clients except through planting secret agents in the shops of those we call to account in the courts. If this kind of espionage has become a way of life in some of today's business competition, such reality should not prompt us to say that no more is expected of today's lawyers than that they conform to the minimal standards of the market place.

Charge No. 13, the employment of Orlando, was added

as a specification of misconduct during the course of the Board of Commissioners' hearing. Mr. Ruffalo objected to this being done, and the Board advised him that he could have time to offer proofs in opposition to the charge. The charge was based upon testimony of Ruffalo and Orlando already in the record. No request was made for further time, and no additional proofs were offered by Ruffalo on the point. We find no procedural impropriety in this regard. Neither do his counsel raise the question here. They do, however, assert deprivation of due process in that prior to Ruffalo's described use of Orlando, he was never told that such would be looked upon as misconduct. They complain for him that no Canon of Ethics had ever been promulgated forbidding this practice. We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge, and then fashion and announce a Canon of Ethics to fit each act of misconduct. Surely our profession is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior.

This is an original proceeding in this Court. We are not reviewing the ruling by the District Court. Respectful of the careful consideration of the matter by the District Judge, we advise our disagreement with his conclusions. While not controlling, we think it proper to observe that it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state.

The name of John Ruffalo, Jr., is hereby stricken from the roll of counsel permitted to practice before this Court. This discipline shall remain in force until the further order of this Court.

APPENDIX.

FINDINGS OF FACT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE.

CHARGE No. 3.

It is charged that the Respondent, acting through an authorized agent, solicited the claim of Mrs. Naomi Mae Clark against the Baltimore and Ohio Railroad Company by reason of the death of her husband, Major Robert Clark who died August 13, 1957 in an accident while employed as an engine house laborer for the Baltimore & Ohio Railroad.

Naomi Clark testified that her husband had worked for the Baltimore & Ohio Railroad in Newcastle and that he died on August 13, 1957 and that two weeks after her husband's death, Elijah Doster came to see her and told her that the Respondent wanted her case. She further testified that she knew of the Respondent and that a Mr. Orlando and others had talked to her about a week after her husband's death and one of those who had seen her gave her the Respondent's telephone number. She said that Elijah Doster told her that the Respondent was the man to employ and that he was also handling Elijah Doster's claim against the railroad.

It appears that Mrs. Clark had known Elijah Doster for a period of approximately twenty-one years. She testified that arrangements were made through Mrs. Betty Orlando, the sister of Michael Orlando, to meet Respondent in Newcastle and that she did meet him there. Betty Orlando is the sister-in-law of Michael Orlando who was an employee of Respondent and also the Baltimore & Ohio Railroad. On September 3, 1957 Mrs. Clark signed a contract employing Respondent to represent her. The contract (Respondent's Exhibit 4) is a printed form which recites in the printed portion that

"I, the undersigned, do hereby retain John Ruffalo as my attorney, acting only upon my own free will without the inducement or solicitation of any person or persons * * *."

Mrs. Clark testified that she had been told by Elijah Doster that the Respondent would let her have money if she needed any during the time he would have her case, and that when she saw the Respondent in September, 1957 he told her that if she needed money he would give it to her. Mrs. Clark's case was settled on November 18, 1960, for $21,000.00, and the Respondent advanced approximately $600.00 to her from time to time before the settlement.

Elijah Doster testified that he had employed Respondent to represent him in a claim against the Baltimore & Ohio Railroad and that while his case was pending, Respondent called him and asked him to talk to Naomi Clark about her case against the railroad, and that pursuant to this request he did talk to Mrs. Clark about employing the Respondent. Doster testified that Angelo Medura phoned him the day before the hearing by the Panel and requested him not to come to court. It also appears that more than a year after Doster's case was settled, the Respondent contacted Doster and gave him $50.00 as a refund for medical fee which related to Doster's case against the railroad. Doster executed a receipt for the fee, dated July 14, 1961 (Respondent's Exhibit 1) and a year later on June 20, 1962 signed a statement for the Respondent (Respondent's Exhibit 2) to the effect that the $50.00 paid to Doster by Ruffalo "was given to me solely as a refund of the medical bill incurred by an examination of Dr. Robinsteen. Dr. Robinsteen died and was unable to appear for me, requiring me to obtain other doctors. * * *." This statement was witnessed by Doster's son, Samuel Doster.

On July 14, 1961, the same day on which Doster was requested to sign a receipt for the $50.00, he also signed an affidavit at the Respondent's office, which affidavit was prepared by the Respondent (Respondent's Exhibit 6). This affidavit recites that

> "Elijah Doster, after first being duly sworn, according to law, deposes and says that at the request of Mr. Ruffalo, he recommended John Ruffalo of Youngstown, Ohio, to Naomi Clark, that he contacted Gordy Marks of Newcastle, Pennsylvania, the brother-in-law of Naomi Clark, who spoke to her about Mr. Ruffalo, and that he learned a few days after that that Naomi Clark had gone to see Mr. Ruffalo, that after his original contact with Mr. Marks, he had talked with Naomi Clark and she informed him that she had gone out to see Mr. Ruffalo, * * * and that it was upon the recommendation that he had made that she came to see Mr. Ruffalo."

When Respondent was testifying on his own behalf he admitted he asked Elijah Doster to recommend Respondent to Naomi Clark, but says this was done "about 15 or 20 minutes before I had any—before I represented her."

Sam Doster testified that he heard his father state to Mr. Ruffalo that he saw Mrs. Clark at Mr. Ruffalo's request.

It also appears that contact was made by Respondent and Angelo Medura of Newcastle, Pennsylvania, with Sam Doster, relating to the question of Elijah Doster's appearance to testify before the Panel, and that Sam Doster was given $5.00 by Medura and a bottle of Respondent's whiskey. This took place at a meeting between Youngstown and Newcastle on December 24, 1962.

At the original hearing held by this Panel in December, 1962, Sam Doster testified about a discussion between himself and Medura, at this meeting, concerning a charge

of homicide then pending against Sam Doster in Pennsylvania. According to Sam Doster, Medura told him that he knew it would cost quite a fee "And he said 'You know that John can't do it himself,' that 'Whatever you need,' that 'I'll get in touch with John for you, and he would give it to me to give you.'" He further testified that this conversation took place outside of the Respondent's car while Respondent was sitting in the car. However, at a subsequent hearing held by the Panel on August 16, 1963, the same Sam Doster was called to testify on behalf of the Respondent. At this hearing he testified that he lied at the previous hearing; that Medura had offered him nothing to persuade his father, Elijah Doster, not to appear at the hearing before the Panel.

Doster said he'd decided to tell the truth because he realized his testimony at the previous hearing had damaged Respondent and he didn't feel right about it. He said he'd lied because he thought the Respondent had not represented his father properly and had been so informed by some representatives of the American Railroad Association. He could not explain why he decided since the December hearing, to change his story. Since the December hearing, he was tried on the homicide charge in Pennsylvania and found guilty. He was out on bond at the time of the August hearing. Whether this had anything to do with the change in this witness' story was not shown. Because of this recantation by Sam Doster of his testimony at the preceding hearing, the Board has placed no credence whatever in this witness' testimony, given either at the preceding hearing or at the present hearing.

At the hearing in December, 1962 the Respondent offered a tape recording of a conversation between the Respondent and his associate, Mr. Montani, with Elijah Doster. Although the recording was played at one of the

hearings held by the Panel, it was inaudible. At the last hearing held on August 16, 1963, the Respondent produced David Burton, a free lance court reporter, who testified that there had been submitted to him a transcript of the tape recording, which had been prepared by the Respondent's secretary, and that the witness compared this transcript with the recording and corrected the transcript in several respects. The witness' transcript was then offered in evidence as an exhibit. However, the Panel sustained the objection to this exhibit and the Board has given it no consideration for the reason that a witness' testimony concerning his interpretation of a tape recording of a conversation with another witness violates the hearsay rule and the rule excluding the opinions of witnesses except in certain defined exceptions of which this is not one.

The Respondent testified that he was first contacted about the Naomi Clark case, by Mrs. Alexander Orlando, Mike Orlando's sister-in-law, on September 30, 1957, when he had returned from a vacation, and that Mrs. Orlando said that she was a friend of Naomi Clark and that Naomi Clark wanted to see him and he suggested that Miss Clark come to see him, but Mrs. Orlando told him she couldn't come and suggested that the Respondent come to Mrs. Orlando's home. Respondent said that he had never known Mrs. Orlando before, although she was the sister-in-law of Mike Orlando who was then an employee of the Respondent.

Mrs. Lois Scopio, Michael Orlando's sister, testified that she was a bookkeeper at a store in Newcastle where Naomi Clark had purchased a coat, and that Naomi Clark had no money to pay for the balance due on the coat, and in the course of the conversation about her account she asked the witness whether she had ever heard of the Respondent, and then asked the witness to call the Respond-

ent, which Mrs. Scopio said she did, but was unable to reach him because he was on a vacation. She testified that Naomi Clark subsequently told her that she had talked to Betty Orlando, Michael's sister-in-law, and had asked her to get in touch with the Respondent.

CONCLUSION.

It is the conclusion of the Board that the evidence with respect to this charge establishes that Respondent was guilty of misconduct in soliciting employment from Mrs. Naomi Clark in violation of Canon 27 of the Canons of Professional Ethics.

CHARGE NO. 8.

It is charged that the Respondent advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. The uncontradicted evidence establishes that Respondent did advance a total of $1,025.-00 to Clara Beighley during the period of time that he represented her, and that he advanced $611.00 to Naomi Clark during the time that he represented her. Respondent's representation of each of these parties extended over a period of several years. Respondent admits that these funds were advanced, but justifies the advances on the ground that they were made as an act of kindness at a time when these clients were in difficult circumstances. No evidence was offered to prove any advances to Sam Cotellesse.

The Legal Ethics Committee of the American Bar Association rendered an opinion, Number 288, on October 11, 1954, to the effect that payments, pending trial in personal injury cases, by an attorney to or for the benefit of his injured client, for any purpose other than to cover expenses of litigation subject to reimbursement, are im-

proper. In reaching this conclusion the committee considered Canon 42 which provides:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

The Committee also considered Canon 10 which provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 refers to expenses which are connected with the litigation such as court costs, depositions and similar expenses. It was the committee's opinion that a lawyer who makes advances to his client for other purposes thereby acquires an interest in the subject matter of the litigation which he is conducting in violation of Canon 10. The committee also observed that the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him in addition to the assurance of performing legal services for the client. In other words, such practice can constitute an indirect form of solicitation. The committee observed that the conclusion which it reached is contrary to the conclusion reached by the Supreme Court of Illinois in the case of *State E. R. Chicago Bar Association v. McCallum,* 341 Ill. 578, 173 N. E. 827. Three of the judges of the Supreme Court of Illinois dissented from the conclusion of the majority. The question was considered by Judge Beamer of the United States District Court for the Northern District of Indiana, Hammond Division, on September 26, 1962, in the case of *El Janny v. Cleveland Tankers, Inc.,* 209 F. Supp. 91. Judge Beamer held that a lawyer was not entitled to an order reimbursing him for monies advanced to his client and stated in the opinion:

> "The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the courts and the organized bar."

He cited and quoted from Opinion 288 of the Committee of the American Bar Association.

While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyers for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.-00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testimony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him.

Conclusion.

It is, therefore, the conclusion of the Board that the Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27.

CHARGE No. 9.

It is charged that Respondent promised to advance money and later did advance money to Andrew Masters during the pendency of Masters' case against the Pennsylvania Railroad. The evidence establishes that there was a discussion between the Respondent and Masters about the advancement of money to Masters at the time Masters first saw Respondent and signed his contract of employment on May 29, 1958 (Respondent's Exhibit 10), and that Respondent advanced monies to Masters on fifteen separate occasions in a total of over $1,200.00 during the period Respondent was representing Masters.

CONCLUSION.

It is the conclusion of the Board that Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 of the Canons of Ethics.

CHARGE No. 10.

It is charged that Respondent is guilty of unprofessional conduct in attempting to influence Elijah Doster in that he endeavored to have Doster sign a false statement that Doster had not been contacted by the Respondent in an effort to have Doster help in the solicitation of the case of Naomi Clark; that at the time Respondent attempted to take said false statement from Doster he paid him the sum of $50.00 in cash. Some of the evidence in support of this charge is discussed in connection with Charge No. 3 pertaining to solicitation by Doster on behalf of the Respondent of Naomi Clark's case. The evidence does establish that on or about July 14, 1961, Respondent prepared an affidavit which Elijah Doster refused to sign until it was corrected, but there is no evidence as to the

contents of such affidavit and, therefore, it cannot be said that the Respondent attempted to have Doster sign a false affidavit. However, the evidence does establish that on the same date Respondent paid $50.00 to Doster and requested him to sign the affidavit, an investigation was being made by a Mr. White of the American Association of Railroads relating to Respondent's activities in suspected solicitation of claims. The payment by Respondent to Doster on that date was obviously for the purpose of influencing Doster as a prospective witness.

Conclusion.

It is the conclusion of the Board that the Respondent was guilty of misconduct in attempting to influence Elijah Doster by the payment of $50.00 to him, in violation of Canon 29 and Canon 32 of the Canons of Professional Ethics.

Charge No. 11.

It is charged that on Christmas Eve, December 24, 1962, the Respondent attempted to intimidate Samuel Doster who was to appear before the hearing panel, by approaching him at Lincoln Knolls Bowling Alley on Route 422 in Youngstown, to prevent him from appearing as a witness by offering him sundry considerations; that the Respondent gave Sam Doster a fifth of whiskey and $5.00 for the purpose of prevailing upon him to prevent his father, Elijah, from appearing as a witness.

The evidence with respect to this charge was reviewed above in connection with the consideration of Charge No. 3 relating to Naomi Clark's claim. The evidence is uncontradicted that the Respondent and Angelo Medura did have a meeting with Samuel Doster on Christmas Eve, December 24, 1962, which was after the Respondent re-

ceived notice of the hearing scheduled by the Panel for December 26, 1962. Respondent said that he merely talked to Sam Doster and asked him to request Sam Doster's father, Elijah, to tell the truth. He denies attempting to influence Sam Doster. It is nevertheless a fact, as testified to by Angelo Medura, that the Respondent did contact Medura for the purpose of having Medura talk to Andrew Masters and that Medura did contact Andrew Masters in connection with the charges pending against Respondent, and that the Respondent was also with Medura for the purpose of talking to Sam Doster. At this meeting Medura did in fact give Sam Doster $5.00 and a bottle of whiskey which was the property of Respondent. While the evidence does not definitely establish that the Respondent was a party to the discussion between Medura and Sam Doster, it is a fact that such discussion took place outside of Respondent's automobile and that Respondent was in the automobile at the time it took place. It is reasonable to infer that whatever discussion took place between Medura and Doster was known to Respondent. Inasmuch as the admitted purpose in seeing Sam Doster was to have him contact his father, Elijah, about his testimony at the hearing before the Panel, it must be concluded that the gifts made to him at this meeting, were for the purpose of influencing him and thereby accomplishing the objective of the meeting. In reaching the conclusion with respect to this charge, the Panel completely disregarded the testimony of Sam Doster given at the original hearing of the Panel in December, 1962, as stated previously in the discussion on Charge No. 3, because this witness recanted that testimony at the hearing held on August 16, 1963 and said that he lied at the December hearing. For the same reason, the Panel disregarded Doster's testimony given at the hearing held on August 16, 1963

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of misconduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

CHARGE No. 12.

It is charged that the Respondent, through one or more of his agents acting on his behalf, did attempt to intimidate the witness, Andrew Masters, on or about Sunday, December 23, 1962, by having his agent offer Masters the sum of $300.00 to keep him from appearing before the Panel as a witness on behalf of the Relator.

Some of the evidence with respect to this charge is discussed above in connection with Charge No. 11. It does appear from the testimony of Andrew Masters that Angelo Medura called Masters on December 23, 1962, and met him and told Masters that "He had an opportunity to get some beer joint, that Mr. Ruffalo was going to back him up * * *"; that Medura further said "You can get $300.00 and you don't have to appear and you're doing me a hell of a big favor." Medura admits talking to Masters on Sunday, December 23, 1962, at Newcastle about Masters' appearance as a witness before the Panel, and that he saw Masters at the Respondent's request. He denied offering Masters any money and explained that Masters was angry with Respondent because Masters was not satisfied with the verdict which had been obtained and because the Respondent did not appeal the case. Medura does admit stating to Masters "Andy, what are you going to gain by going over to Youngstown to hurt this man."

In view of the fact that Medura had contacted Masters at Respondent's and had also talked to Sam Doster in the presence of Respondent about being a witness before

the Panel in the charges against the Respondent, and had admittedly offered Doster inducements not to appear as a witness, the Board concludes that the evidence supports the charge that Medura did offer Masters a consideration to prevent Masters from appearing as a witness against the Respondent.

At the hearing which the Panel held on August 16, 1963, the Respondent called two witnesses, Joseph Edward Petite and Carl R. Foster, who testified that on December 27, 1962, they had gone to the dining room of the Tod Hotel in Youngstown at the request of the Respondent, and taken a table next to that which was occupied by Mr. and Mrs. Masters and a Mr. White, who represented the American Association of Railroads, and that during this conversation Master was overheard telling White that Medura did not offer Masters any money, and that Masters was a friend of Medura's and did not want to hurt him, and White replied that while Masters did not want to hurt Medura he did want to get at Ruffalo, and White told Masters that Masters should go in and testify about being offered $300.00 by Medura. Both of these witnesses admitted that the Respondent had formerly represented them in personal injury cases. They were both employed at the time they gave their testimony. They said they occasionally did work for the Respondent. The Relator objected to the testimony of both of these witnesses concerning the conversations which they allegedly overheard between White and Masters. The objection was sustained for the reason that if the purpose of such testimony was to contradict the testimony given by Masters at the previous hearing, it was necessary to lay a foundation for such contradictory testimony by first asking Masters himself about the alleged conversation between him and White. This was not done, and therefore, the testimony of both of these witnesses was

nothing more than hearsay. *King v. Wicks*, 20 Ohio 88; *Columbus v. Freeze*, 100 O. A. 37, 59 O. O. 474; 56 O. Jur. (2d) 816, Sec. 380.

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of unprofessional conduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.*

EDWARDS, Circuit Judge, dissenting. Respectfully, I dissent from the opinion of this court.

This is a disturbing record on practically all counts. The State of Ohio, acting through its Bar Association and Supreme Court, has disbarred respondent on grounds which will be discussed. The Ohio disbarment is final and is not before us for review.

Dealing with a motion to disbar respondent before the United States District Court for the Northern District of Ohio, the United States District Judge reviewed the same record and held that adequate grounds for disbarring respondent from practice before the federal courts had not been established. *In re Ruffalo*, 249 F. Supp. 432 (N. D. Ohio 1965).

We deal, under our Court Rule 6(3),[1] with a similar petition to disbar respondent in this court. We review the same record.

The respondent was a lawyer in active practice principally representing railroad employees in Federal Em-

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* **Petitioner's Note:** Charges 3, 9, 10, 11 and 12 were found not proved by the Ohio Court; the Court disagreeing with facts as recommended by the Board of Commissioners, 176 O. S. 269.

[1] Rules of United States Court of Appeals for Sixth Circuit (May 1, 1956, as amended April 15, 1966).

ployees Liability Act suits against railroad companies. The Association of American Railroads instigated an investigation of respondent which led directly to the present charges and proceedings.

Most of the testimony adverse to respondent was that of former clients in relation to whose cases respondent had not succeeded in achieving a result satisfactory to them—or for that matter, to him.

The basic charges at the outset were that respondent had engaged in unethical conduct as a lawyer by soliciting lawsuits and employing others to solicit lawsuits for him—in short, what is termed "ambulance chasing."

The State Bar Association panel dismissed seven of fourteen charges and found respondent guilty on the other seven. In its review of the same record the Supreme Court of Ohio, however, found respondent guilty of unethical practices in only two instances. These concerned the making of certain loans to two of respondent's clients and the hiring as an investigator of a person who was also a brakeman for the Baltimore & Ohio Railroad.

In finding the loans made by respondent to be violations of the Canons of Professional Ethics of the American Bar Association (which have been adopted by rule in Ohio), the Ohio Supreme Court relied upon Canon 10, which says: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

The undisputed facts are that out of a very busy practice and after a thorough and thoroughly hostile investigation respondent was shown to have made such loans in two instances.

On June 16, 1957, Mrs. Clara Beighley's husband died as a result of an injury received while working as a conductor for the Baltimore & Ohio Railroad. His widow

employed Ruffalo to represent her in her claim against the B. & O. In the next four years respondent advanced periodic sums of $50 to Mrs. Beighley, which ultimately totaled $1,025.

The other loan pertained to another B. & O. widow. Mrs. Naomi Mae Clark's husband died August 13, 1957, in an accident while employed as an engine house laborer. Mrs. Clark retained respondent on September 3, 1957, and approximately three years later received $21,000 in a settlement with the B. & O. Meantime, respondent had made periodic advances to her which totaled $611 at the time of settlement.

I cannot in good conscience agree that the making of such small loans as these to two admittedly impoverished widows represented purchasing an interest in litigation. If this record showed that making maintenance loans to clients was a general practice employed by respondent so as to become widely known and hence to constitute an economic attraction for potential clients, we would have facts from which such an inference properly could be drawn. Clearly we do not have such proofs in this record.

We recognize, of course, that the American Bar Association's Professional Ethics Committee has published an opinion, No. 288, (41 A. B. A. Journal 33 (Jan. 1955)) which may be cited as general support for the view expressed by the Ohio Supreme Court. This view is, however, against the great weight of opinion in the courts in this country. *People ex rel. Chicago Bar Association v. McCallum,* 341 Ill. 578, 173 N. E. 827 (1930); *Johnson v. Great Northern Ry. Co.,* 128 Minn. 365, 151 N. W. 125 (1915); *Hildebrand v. State Bar of California,* 18 Cal. 2d 816, 117 P. 2d 860 (1941); *In re Moore,* 8 Ill. 2d 373, 134 N. E. 2d 324 (1956); *In re Sizer,* 306 Mo. 356, 267 S. W. 922 (1924); *Bank of Chenango v. Hyde,* 4 Cow.

567 (N. Y. 1825); see also *Grievance Committee of Fairfield County Bar v. Nevas*, 139 Conn. 660, 96 A. 2d 802 (1963); *State ex rel. Florida Bar Association v. Dawson*, 111 So. 2d 427 (1959). We likewise feel that it is a view which is basically inconsistent with the attitude toward legal representation in FELA cases expressed by the Supreme Court of the United States in *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

The view of the Illinois Supreme Court adopted in *McCallum* in my opinion expresses the majority view in this country on this issue:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a cause where without such aid he would be unable to enforce a just claim. *Christie v. Sawyer*, 44 N. H. 298; *Shapley v. Bellows*, 4 N. H. 355. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of

the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered. *Johnson v. Great Northern Railway Co.*, 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140; *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999. By canon 42 of the Ethics of the American Bar Association, it is permissible for an attorney to advance costs and court charges for his client, with the understanding that the same are to be ultimately paid by the client," *People, ex rel. Chicago Bar Association v. McCallum, supra*, at 589.

I turn now to the second issue in this case. Respondent employed one Orlando, whose regular occupation was that of a brakeman on the B. & O. Railroad. He worked on a night shift. Respondent testified that Orlando's employment with him was that of an investigator of FELA cases brought by respondents against railroads, including Orlando's employer.

I note that Orlando's work involved no supervisory responsibilities to his employer and no access to records, confidential or otherwise, which would have assisted him in his daytime job with respondent.

But discounting these factors as much as I do, I cannot avoid concluding that Orlando's access to the B. & O.'s property and personnel would be of potential value to respondent and that it would some times be impossible (probably even for Orlando) to know when Orlando was working for the railroad and when he was investigating for respondent.

I believe the day is long gone when a railroad so owned its employees' souls that it should be held impermissible for one of its brakemen to accept outside em-

ployment on his own time (even as an investigator of lawsuits against another railroad). But the employment of a railroad employee to investigate accident claims against his own employer opens a tempting door to industrial spying which no person of ordinary conscience should be asked to go by every normal work day.

Respondent's actions in hiring Orlando for the purposes admitted by respondent, in concealing the employment relationship and in being a great deal less than fully cooperative with the Bar Association's investigation of his record in this matter convince the majority that he was aware of the conflict of interest inevitable (for Orlando!) in his hiring Orlando to investigate accident cases against Orlando's own employer. These facts also convince me.

This, however, does not end the matter. In order for a lawyer properly to be found guilty of an offense and barred, perhaps forever, from the practice of his profession, he should have advance notice that the act he was charged with was an offense, and prior to his hearing he should have written notice of the charge made against him. Respondent here had neither.

The charge we deal with here was numbered 13 and it was added by oral motion at page 662 of this 1034 page transcript over respondent's strong objection. Such procedural violation of due process would never pass muster in any normal civil or criminal litigation. Nor should it here. *Selling v. Radford*, 243 U. S. 46 (1917).

Even more to the point, the Ohio Bar Association and the Ohio State Supreme Court were unable to cite any canon of ethics which purported to forbid respondent's conduct in hiring Orlando. Neither do my colleagues. Nor is any prior ethics opinion or case precedent cited for the holding here.

Under the circumstances, I would think that the course of action taken by the Illinois Supreme Court in *In re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 398, 150 N. E. 2d 163, 168 (1958), was an appropriate one to follow. In declaring a representation plan (previously approved by another court) to be improper, the Supreme Court then held that "proceedings looking toward the imposition of discipline should not be pursued. * * *" in that case.

There is an ancient adage, "Where there is smoke there is fire." If this were a governing rule of law, I would quickly have agreed with my brethren's result in this case. This record surely contains a great deal of smoke. The writer confesses that he, too, is capable of being impressed thereby.

Finding myself, however, in fundamental disagreement with relying for disbarment on the issues dealt with above, I undertook research of the record for a possible concurring opinion which I thought would be founded upon the ambulance chasing and witness tampering findings of the Ohio State Bar. To abbreviate a lengthy recital and weighing of a record of over 1,000 pages of transcript, I note that I simply could not find reliable evidence upon which to approve these findings. I deduce that my colleagues cannot do so either. Yet they include as an appendix these same findings upon which neither they nor the Ohio Supreme Court saw fit to rely.

For the reasons I have indicated above, I feel there are "grave reasons" why this court should agree with the United States District Judge in declining to accept the judgment of disbarment of the Supreme Court of Ohio.

APPENDIX D.

SECOND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT.

BATTISTI, *J.*:

In a memorandum opinion dated October 4, 1965, this Court found that Respondent John Ruffalo, Jr., had shown cause why he should not be disbarred from practice before the United States District Court for the Northern District of Ohio. *In re Ruffalo,* 249 F. Supp. 432 (N. D. Ohio, E. Div., 1965). In the same opinion the Court made the following observation:

> "At the present time disbarment proceedings against the Respondent are pending in the Sixth Circuit Court of Appeals. Since the issues raised in the Sixth Circuit Court of Appeals are identical to those raised here, a final order will be deferred pending a decision by that Court. In the meantime, an order will be entered restoring Respondent to practice before this Court. In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings. Otherwise, a final order will be entered consistent with conclusions reached in this memorandum opinion."

On December 29, 1966, the Sixth Circuit Court of Appeals, in a two to one decision, concluded:

> "This is an original proceeding in this Court. We are not reviewing the ruling by the District Court. Respectful of the careful consideration of the matter by the District Judge, we advise our disagreement with his conclusions. While not controlling, we think it proper to observe that it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state.

> "The name of John Ruffalo, Jr., is hereby stricken from the roll of counsel permitted to practice before this Court. This discipline shall remain in force until further order of this Court."

In view of the opinion of the United States Court of Appeals for the Sixth Circuit, the findings and conclusions of October 4, 1965, have been reconsidered.

At the outset, and in all candor, it should be noted that this Court has an abiding conviction that the findings and conclusions of October 4, 1965, are correct. While, technically, there may be no absolute obligation to follow the decision of the Court of Appeals, other considerations dictate that the findings and conclusions of October 4, 1965, be vacated. Foremost among them is a deep conviction that the orderly and effective administration of justice compels a district court to faithfully respect and defer to the opinions of its circuit court of appeals. Thus, an order will be entered suspending John Ruffalo, Jr., from practice before the United States District Court for the Northern District of Ohio until further order of this Court.

/s/ FRANK J. BATTISTI,
United States District Judge.

APPENDIX E.

DECREE OF THE CIRCUIT COURT OF APPEALS.

(December 29, 1966.)

This cause is before the court upon its order to the respondent, John Ruffalo, Jr., to show cause why his name should not be stricken from the roll of counsel of this court, and upon the said respondent's response to said order and upon due consideration thereof, and for reasons set forth in the opinion of this court filed contemporaneously herewith,

IT IS ORDERED that the name of John Ruffalo, Jr., be, and it is, hereby stricken from the roll of counsel permitted to practice before this court. This discipline shall remain in force until the further order of this court.

Entered by order of the court.

/s/ CARL W. REUSS, *Clerk.*

JUN 16 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. ~~1387~~. 73

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

RESPONSE OF THE MAHONING COUNTY BAR ASSOCIATION
To Petition for a Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit.

HENRY C. ROBINSON,
206 Legal Arts Centre,
Youngstown, Ohio,
President, Mahoning County Bar Association.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1187.

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

RESPONSE OF THE MAHONING COUNTY BAR ASSOCIATION To Petition for a Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit.

The Mahoning County Bar Association, Youngstown, Ohio, respectfully submits this Response in opposition to the prayer for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 29, 1966.

PRELIMINARY STATEMENT.

The Mahoning County Bar Association, as part of its statement of position and brief, adopts:

(a) The conclusion and majority opinion of the United States Court of Appeals for the Sixth Circuit: 370 F. 2nd 447 (reprinted in Petitioner's Appendix C).

(b) The judgment and majority opinion of the Ohio Supreme Court: 176 O. S. 263, 199 N. E. 3rd 393 (reprinted as Petitioner's Appendix E).

(c) The briefs of the Ohio State Bar Association filed in the United States Court of Appeals for the Sixth Circuit and this Court.

In addition to the above the Mahoning County Bar Association submits the following:

JURISDICTION.

Petitioner claims two grounds for jurisdiction:

First, to review the judgment of the United States Court of Appeals for the Six Circuit, by virtue of 28 U. S. C., Section 1254 (1), and

Second, that this Court take notice of his disbarment below and consider his brief as a showing of good cause why he should not be disbarred in this Court.

Petitioner's *first* ground for jurisdiction is not well taken. Since each Federal Court has the power to determine who may practice before it, this determination by the Court of Appeals may not be reviewed by this Court. If this Court should find that it may have some jurisdiction in this regard, that jurisdiction would be limited to whether or not the Petitioner was denied due process in the Circuit Court. To go further would be to review the merits of the judgment of the Ohio Supreme Court when it disbarred the Petitioner (176 O. S. 263). *This Court has already denied a review of that decision when it denied certiorari from that judgment in 1964* (379 U. S. 931).

Under Petitioner's *first* claimed ground of jurisdiction the only question, if any, is: Was Petitioner denied due process in the Circuit Court? It is obvious from the record now before this Court he was not.

A determination here that there was due process in the Circuit Court would be a finding that Petitioner has not shown good cause why he should not be disbarred from the Supreme Court as well, for the reason that Supreme Court Rule 8 clearly provides that if an attorney has been properly disbarred in the Circuit Court he will be "forthwith suspended from practice * * *," in the Supreme Court.

Under Petitioner's *second* claimed ground of jurisdiction, the only question is: Does Petitioner's brief show good cause why he should not be disbarred from practice before this Court? The record again very clearly shows he was thoroughly apprised of the charges and given every opportunity to show good cause why he should not be disbarred before the Circuit Court, and that court wisely ruled he had failed to do so.

To the Petitioner's *second* ground for jurisdiction we agree that this Court should take notice of his disbarment below, but respectfully aver that his brief does not provide a sufficient showing of good cause to prevent his disbarment before this Court.

QUESTIONS PRESENTED.

On page 3 of the Petition for a Writ of Certiorari two questions are raised by the Petitioner.

The *first* question the Petitioner asks this honorable Court to determine is, in essence, whether a mere segment of the facts found by the Ohio Supreme Court is sufficient grounds for that court to suspend him from practice. We are not here on an appeal from that decision; that decision was brought before this Court on Motion to Certify in 1964 and the Motion was denied. The decision of the Ohio Supreme Court is now final and no longer reviewable here

for the reason that the questions Petitioner asks here were also not before the United States Court of Appeals for the Sixth Circuit from which decree Petitioner prays for a writ of certiorari.

The *second* question raised on page 3 of the Petition for a Writ of Certiorari does not fall within the limits set forth in Rule 19 of this Court.

STATEMENT IN OPPOSITION TO PETITIONER'S BRIEF.

On the question of Petitioner's right to a review of the Circuit Court's judgment, assuming he has such a right, he is asking this Court to review everything which was before the Circuit Court and to substitute this Court's judgment for that of the Circuit Court. Such a review, we respectfully contend, is beyond the jurisdiction of this Court and beyond the rights of the Petitioner. Petitioner was given every opportunity to show good cause why he should not there be disbarred. He had full advantage of due process in the Circuit Court, *which he does not deny,* and, therefore, no review of the Circuit Court's judgment should be had and certiorari on this ground should be denied.

As to the Petitioner's showing of good cause why he should not be disbarred in the United States Supreme Court, he does not ask for a writ of certiorari, and none is required. We respectfully contend no review of all of the lower courts' opinions and the substitution of this Court's judgment for theirs is allowable. The Circuit Court has the right and power to enforce its own rules and the decision of the Ohio Supreme Court is now final.

In determining whether Petitioner is to be disbarred before this Court, this Court is limited to the same ques-

tions as those to which the Circuit Court was limited. These were prescribed by this Court in *Selling vs. Radford,* 243 U. S. 46. They are set forth on page 16 of Petitioner's Brief, on page 10 of the Circuit Court's Opinion and may be paraphrased as follows:

1. Did the state procedure fail to give Petitioner such notice or opportunity to be heard as to be wanting in due process?

2. Was there such an infirmity of proof as to the facts found in the state procedure, that this Court could not accept as final the conclusions on the subject?

3. Was there some other grave reason why this Court should not give full credit to the judgment of the Supreme Court of the State of Ohio, and thus avoid the rule requiring Petitioner to be suspended from practice in this Court?

As Petitioner's brief has failed to provide an affirmative answer to any of these questions, he has failed to show good cause why he should not be disbarred in this Court.

Unless this honorable Court finds from Petitioner's brief a violation in one of the three areas stated, we contend it is bound by its own rule to disbar the Petitioner from practice before it.

The United States Court of Appeals for the Sixth Circuit, in the exercise of due process and upon careful consideration, determined that:

1. In the Ohio State procedure there was due process;

2. There was a firm rather than an infirm proof of facts;

3. It was consistent with the Circuit Court's duty, under the facts presented, to accept as final the conclusion of the Ohio Supreme Court; and

4. There was no other reason why the Circuit Court should not allow the natural consequences of the judgment of the Ohio Supreme Court to result in the suspension of the Petitioner from practice before the Circuit Court, according to its rules.

CONCLUSION.

It is respectfully submitted that the Writ of Certiorari ought to be denied, and that this honorable Court disbar the Petitioner under authority of its Rule 8.

Respectfully submitted,

HENRY C. ROBINSON,
President, Mahoning County Bar Association.

FILED
JUN 17 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 73

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

BRIEF OF OHIO STATE BAR ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL T. GAINES,
700 Union Commerce Bldg.,
Cleveland, Ohio,

WALTER A. PORTER,
Talbott Tower,
Dayton, Ohio,

P. PAUL PUSATERI,
137 W. Main Street,
Wilmington, Ohio,

JOHN R. WELCH,
33 West Eleventh Avenue,
Columbus, Ohio,
Counsel for Ohio State Bar Association.

CRAIG SPANGENBERG,
1500 National City Bank Bldg.,
Cleveland, Ohio,
Counsel for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1187

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

BRIEF OF OHIO STATE BAR ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT AND ARGUMENT

In 1962, the Mahoning County Bar Association filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, charges of professional misconduct against petitioner, Ruffalo. The Board of Commissioners is made up of seventeen members of the Ohio Bar. They are appointed by the Supreme Court of Ohio, pursuant to its Rule XVIII (1), and act as an arm of that Court.

The complaint against petitioner alleged fourteen charges of misconduct. The Board of Commissioners convened a panel of three of its members to hear the evidence on the charges and make an initial report to the Board. The charges covered generally acts of solicitation of F.E.L.A. cases, maintenance of persons asserting claims, attempted bribery, and hiring a railroad employee, Michael Orlando, to act as an undercover agent to assist petitioner in solicit-

ing and investigating cases against various railroads, including Orlando's employer, the Baltimore and Ohio Railroad.

The panel conducted hearings which extended from December 26, 1962 to August 16, 1963. The panel report sustained seven and dismissed seven of the charges. It was unanimously adopted by the seventeen-member Board of Commissioners. The charges sustained involved solicitation, maintenance of clients, attempted bribery to dissuade a witness from testifying against petitioner, and the use of Orlando as an undercover agent.

The Findings of Fact, Conclusions and Recommendation of the Board were returned to the Supreme Court of Ohio. The recommendation of the Board was that petitioner be disbarred. The Supreme Court of Ohio sustained charge number eight, maintenance of clients, and thirteen, use of the undercover agent Orlando to investigate claims against his regular employer, the Baltimore and Ohio Railroad. It gave judgment that petitioner be suspended for an indefinite period of time from the practice of law. *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263 (1964). Certiorari was denied by this Court, *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931 (1964).

In deciding that petitioner should be suspended from practice, the Supreme Court of Ohio, in addition to its consideration of the current charges, recited and took into account the fact that in 1957 petitioner had been found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people."

Following the judgment of the Supreme Court of Ohio, the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to its own rules, com-

menced an inquiry as to the fitness of petitioner to continue as a practitioner in that Court. The District Judge had before him the record and proceedings which culminated in the decision of the Supreme Court of Ohio. He disagreed, however, with that decision and refused to suspend petitioner from practice in the District Court. *In re Ruffalo,* 249 F. Supp. 432. He withheld the entry of a final order, stating that "In the event that the Sixth Circuit Court of Appeals reaches a different conclusion this court will reconsider its findings."

After the above decision by the District Court, the Court of Appeals for the Sixth Circuit issued an order to petitioner to show cause why he should not be stricken from the roll of counsel in that Court. The Court of Appeals had before it the entire record of the proceedings in the Supreme Court of Ohio, the response and brief of petitioner, the brief of the Ohio State Bar Association as amicus curae, and oral arguments of counsel. Following the admonitions of this Court in *Theard v. United States,* 354 U.S. 278, 1 L. Ed 2d 1342 and *Selling v. Radford,* 243 U.S. 46, 61 L. Ed 585, the Court proceeded to review on its own the validity of the conclusions of the Supreme Court of Ohio. Agreeing with the conclusions of the court, the Court of Appeals struck petitioner's name from the roll of counsel admitted to practice in that Court, saying, "We need not, and do not, announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. We do not reach that question. *We are satisfied that with Ruffalo's previous conviction in 1957 of solicitation,* and the conduct making up Charge 13, there is sufficient to permit us consistent with 'principles of right and justice,' to 'allow the natural consequences of the judgment (of the Supreme Court of Ohio) to have

their effect * * *,' *Selling v. Radford,* 243 U.S. 46, 51, and strike Mr. Ruffalo's name from the roll of counsel admitted to practice in this Court." *In re Ruffalo,* 370 F. 2d 447, 450. (Emphasis added)

1. The Trial Bar Needs Guidelines For Permissible Conduct In Case Preparation.

Petitioner argues that this case is of vital concern to every practitioner at the federal bar. He says the decision imposes arbitrary limits on methods of trial preparation.

Of course this case is important to Mr. Ruffalo. Simply put, he would like to continue his practice at the federal bar while he is suspended from practice in the State courts.

So far as we know, this is the only case of a claimant's lawyer employing a railroad employee as an undercover agent to investigate cases against his own employer. Mr. Ruffalo admitted as much at his hearing in the state proceedings. Mr. Ruffalo had just testified that all top lawyers who "practiced railroad law" always have a "good railroad" man in their employ, some one to reach out to and to talk to. He was then asked by Judge Middleton, a member of the hearing panel if,

> "They all have an undercover man in the employ of the road?" Mr. Ruffalo answered: "No, they have somebody that knows railroading and railroads." (R. 661)

We are in accord with the view of the court below that: "We do not believe we should tell today's society that notwithstanding the respect we ask it to give us as a profession of skillful and high minded men we do not have the ability to adequately represent our clients except through planting secret agents in the shops of those we call to account in the courts. If this kind of espionage has become a way of life in some of today's business competi-

tion, such reality should not prompt us to say that no more is expected to today's lawyers than that they conform to the minimal standards of the market place." *In re Ruffalo,* 370 F. 2d 447, 453.

2. The Independent Jurisdiction of the Federal Courts.

3. Disciplinary Action on the Present Grounds Would Inhibit Enforcement of Rights Under an Important Federal Statute.

4. The Grounds Relied on For Disbarment of Petitioner Are So Arbitrary and Irrational That to Act on These Grounds Would Deny Petitioner Due Process of Law.

The court below obedient to the rules laid down by this court in *Theard v. United States,* 354 U.S. 278, L. Ed. 2d 1342, and *Selling v. Radford,* 243 U.S. 46, 61 L. Ed. 585 allowed petitioner to bring the entire record of the state proceedings before it for review, to file a brief in support of his view of that record and the judgment of the state court, and to orally argue his position.

Based upon its own independent review of that record and the judgment of the Supreme Court of Ohio, the majority of the court below has determined that petitioner should be struck from the roll of counsel admitted to practice in that Court. The court saying at page 450: "We need not, *and do not,* announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. *We do not reach that question.* We are satisfied that with Ruffalo's previous conviction in 1957 of solicitation, and the conduct making up Charge 13, there is sufficient to permit us, consistent with 'principles of right and justice' to 'allow the natural consequences of the judgment (of the Supreme Court of Ohio)

to have their effect * * *.' *Selling v. Radford,* 243 U.S. 46, 51, and strike Mr. Ruffalo's name from the roll of counsel admitted to practice in this Court." (Emphasis added.)

Two things should be noted from the above quoted holding of the court below. One. At page 16 of his petition, petitioner again states that, "The Circuit Court of Appeals has found that this charge (Charge No. 8, advancement of living expenses to clients) did not justify disbarment and petitioner will not elaborate upon it here." This statement is obviously not in accord with the holding by the court below. We note also that petitioner says he will not elaborate upon it here. Yet, recognizing that the court below did not make a finding on Charge No. 8, petitioner devotes the better part of pages 18, 20 and 21 of his petition arguing that discipline based upon such a finding is arbitrary and irrational. What he apparently seeks by this argument is a review by this court of the proceedings in the state court which this court denied in 1964. *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931. This argument is neither relevant nor pertinent to the findings and judgment of the court below.

Two. Petitioner chooses to ignore the fact that the judgment below (and the judgment in the Supreme Court of Ohio) was based in part on the fact that he had been disciplined in the year 1957 for solicitation of professional employment from sundry people through duly authorized agents and employees.

5. Petitioner's Disbarment Has Denied Him Due Process of Law.

Petitioner was not disbarred in the court below because of his failure to "produce records to prove he had not hired and paid Orlando as a solicitor of cases." Nor was he disbarred, for asserting privilege against self-incrimina-

tion. He made no such assertion. In other words, petitioner does not come within the recent ruling of this Court in *Spevack v. Klein,* 35 U.S. Law Week 4140.

Petitioner was struck from the rolls of the court below because that Court could not "find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be the mark of a lawyer."

Petitioner does not dispute the facts that form the basis of the above conclusion. His quarrel is with the conclusion. He just does not agree that he did anything wrong. However, after a review of the record of the entire proceedings in the state court, the court below was convinced that petitioner not only acted improperly but also that he was aware that his actions were improper.

> "Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this court had, and have, the right to draw inferences as to what this conduct portrays. The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping."

Judge Edwards, in his dissenting opinion, was also convinced that petitioner knew his actions were improper.

> "Respondent's action in hiring Orlando for the purposes admitted by respondent, in concealing the employment relationship and in being a great deal less than fully cooperative with the Bar Association's investigation of his record in this matter convinces the majority that he was aware of the conflict of interest

> inevitable (for Orlando!) in his hiring Orlando to investigate accident cases against Orlando's own employer. These facts also convince me."

Charge No. 13, the employment of Orlando to investigate cases against his employer, was added as a specification of misconduct on motion of counsel for the Mahoning County Bar Association during the course of the Board of Commissioner's hearing December 28, 1962. Mr. Ruffalo objected to this being done, and the Board advised him that he could offer proofs in opposition to the charge. The charge was based upon testimony of Ruffalo and Orlando already in the record. On August 16, 1963, the hearing was again convened to hear additional evidence. But no further evidence was offered by petitioner on this point.

The court below found no procedural impropriety in the above action nor was any raised by counsel for petitioner in that court.

However, petitioner asserts here, as he did below, deprivation of due process in that prior to his described use of Orlando, he was not warned that such would be looked upon as misconduct.

In rejecting this claim, the court below said:

> "They complain for him that no Canons of Ethics had ever been promulgated forbidding this practice. We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge and then fashion and announce a Canon of Ethics to fit each act of misconduct. Surely our profession is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior."

We are in accord and ascribe to the above holding.

Statutes in many, if not most of the states, authorize the

suspension or removal of attorneys upon specified grounds. However it is generally held that such statutes do not restrict the general powers of the court over attorneys, who are officers, and that they may be removed for other than statutory grounds. And in Ohio "The statutory grounds for the suspension or disbarment of an attorney are not exclusive and are not strictly binding upon the courts, other serious unprofessional and unethical conduct may be the basis for court proceedings to reprimand, suspend or disbar." *In re McBride,* 164 Ohio St. 419, 424, and cases cited therein.

CONCLUSION

The Ohio State Bar Association respectfully submits that the Petition for Certiorari should be denied.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief has been mailed by first class mail with postage prepaid to attorney for Petitioner, Craig Spangenberg, at his office located at 1500 National City Bank Building, Cleveland, Ohio.

/s/ Samuel T. Gaines,
Counsel for Ohio State Bar Association.

SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF: JOHN RUFFALO, JR.,

Petitioner.

BRIEF OF PETITIONER

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

CRAIG SPANGENBERG,
1500 National City Bank Bldg.,
Cleveland, Ohio,
Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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REFERENCE TO OPINIONS BELOW.

The opinion of the United States Court of Appeals is reported in 370 F. 2d 447 and is reprinted in Appendix C. Opinions of other courts which have passed upon the matter are printed in full in the appendix. The opinion of the Supreme Court of Ohio, which originally imposed indefinite suspension on Petitioner, is reported in 176 Ohio St. 263, 199 N. E. 2d 396 (1964), reprinted in Appendix A.

Thereafter the District Court of the United States for the Northern District of Ohio, Eastern Division, served motion to show cause on Petitioner, and after full hearing refused to suspend him in that court. The opinion is reported in 249 F. Supp. 432, reprinted in Appendix B. After the decision by the Court of Appeals the District Court conformed its decree to the decree of its superior court. The second memorandum opinion of the District Court, not officially reported, is reprinted in Appendix D.

JURISDICTIONAL GROUNDS.

The United States Court of Appeals entered its decree striking the name of Petitioner from the roll of its counsel on December 29, 1966. Petitioner filed petition for a writ of certiorari, within 90 days, on March 24, 1967, invoking

the jurisdiction of this Court under 28 U. S. C., Section 1254 (1). The writ of certiorari was granted on October 9, 1967.

It is also suggested that Petitioner is a member of the bar of this Court, and pursuant to Rule 8 is subject to suspension from practice before this Court, but with opportunity to show cause why he should not be disbarred. This Court may consider this brief as Petitioner's showing of cause why he should not be disbarred from practice before the Supreme Court of the United States, formal notice to show cause being waived.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF PRACTICE AND CANONS INVOLVED.

1. Amendment V, Constitution of the United States.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Amendment XIV, Constitution of the United States.

"*1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. U. S. C. Title 45, Section 60.

"*60. Voluntary furnishing of information not to be prevented.*—Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

4. Rules of Practice of the Supreme Court of Ohio.

Rule XXVII (published at pp. lxxvi-lxxxiv, 167 Ohio St. Reports):

Disciplinary Procedure. Pursuant to the powers of this Court over the Bar of this State and the members thereof Rule XXVII is hereby amended as follows effective January 1, 1957; and to remain in force until altered or abrogated.

(1) There is hereby created as commissioners of this Court a Board of Commissioners on Grievances and Discipline * * *.

(3) Said Board of Commissioners shall consist of seventeen (17) members * * *.

(5) *Definition of Misconduct.* Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to the practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

(8) A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as Respondent * * *.

(10) After Respondent's answer has been filed * * * a formal hearing shall be held * * * by a panel of Commissioners appointed by the Chairman of the Board of Commissioners * * *. Such panel shall consist of three (3) Commissioners * * *.

(13) If the panel finds and determines that the Respondent is guilty of misconduct and that * * * indefinite suspension * * * is merited, the panel shall make its certified report * * * and shall file the same * * * with the Secretary of the Board of Commissioners.

(15) If the Board of Commissioners determines that a * * * suspension * * * is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings * * * in the office of the Clerk of this Court.

(19) Upon failure of the Respondent to file objections, or after consideration of such objections and such briefs as may be filed for and against the same, and after hearing, if requested by this Court, this

Court shall enter such order upon the matter as it may find proper * * *.

(37) The process and procedure under this rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint * * * may be made at any time prior to final order of the Court * * *.

Rule XXVIII. Rules of Professional Conduct. (Published in 167 Ohio St. at p. lxxiv).

Section 1. These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension, or by disbarment, as provided in Rule XXVII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.

5. Rules of the Supreme Court of the United States.

Rule 8. DISBARMENT:

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no

order of disbarment will be entered except with the concurrence of a majority of the justices participating.

6. Canons of Professional Ethics of the American Bar Association.

Canon 10. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

Canon 42. A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement.

THE QUESTIONS PRESENTED FOR REVIEW.

One question presented is whether a trial lawyer with a substantial FELA practice should be disbarred because he hired a railroad employee, a night-shift car inspector, to work for him on a piece work basis during off-days and off-duty hours to find and interview witnesses, drive witnesses to court, and advise the lawyer on railroading customs and practices in cases some of which involved the particular railroad which was the general employer of the investigator. A subsidiary question is whether, if hiring such an employee to do investigating work is to be considered a disbarment offense, due process requires that there be some form of advance definition and notice that such conduct is prohibited.

Another question is whether a lawyer with an extensive litigation practice, in a state which does not prescribe any form of record keeping as a condition of practice, is required to make book entries or create financial records to prove he has not solicited cases; is required to preserve such records; and is required to

produce them on request when charged with professional misconduct on pain of an inference of guilt justifying disbarment for failure to create, preserve, and produce exculpatory records.

If this Court reviews the findings and opinion of the Ohio Supreme Court in order to determine whether, under its own Rule 8, Petitioner should be stricken from the roll of practitioners admitted to its bar, then the Court may consider whether it is a disbarment offense for a lawyer to make occasional loans to a few needy clients to enable them to survive, when there is no promise to make such loans given in advance as an inducement to retain the lawyer's services.

STATEMENT OF THE CASE.

The petitioner was ordered indefinitely suspended from the practice of law by the Supreme Court of Ohio on May 20, 1964, on two findings of alleged misconduct. That order is final and is not here subject to review. Petitioner does not question the findings of fact as to his conduct, but insists that his conduct was not wrongful, and not unethical.

Thereafter the District Court of the United States for the Northern District of Ohio ordered the petitioner to show cause why he should not be disbarred in that court. The District Judge accepted the findings of fact of the Ohio Court but disagreed with its legal conclusion. He found there was no misconduct, and no reason to disbar petitioner, and refused to suspend him from practice.

The Court of Appeals for the Sixth Circuit in turn ordered petitioner to show cause why he should not be stricken from the roll of that Court on the basis of the state disbarment order. The Court of Appeals reviewed the record of the state disbarment proceedings and con-

cluded, in the majority opinion, that one of the two charges did not justify discipline but that the lone charge of hiring an "undercover agent" did sustain the state court discipline and required petitioner's disbarment from practice before the Court of Appeals. The minority opinion of the Court of Appeals, dissenting, found that neither charge of misconduct on the conceded facts justified suspension from practice and approved the decision of the District Court.

There is no factual dispute to review. Petitioner was an active trial lawyer with offices in Youngstown, Mahoning County, Ohio. He handled many FELA cases in Ohio and in nearby areas of Pennsylvania. For many years the Claims Research Bureau of the American Association of Railroads sent an investigator to see every client of Petitioner after final disposition of the client's claim, in an effort to discover any kind of misconduct in obtaining or handling the case. (R. 770-773.) A very few disgruntled former clients made claims of impropriety which the American Association of Railroads then turned over to the President of the Mahoning County Bar Association, who was also the defense counsel in the Youngstown area for the B. & O. Railroad. (A. 21a.) The Mahoning County Bar Association then filed ten charges against the Petitioner.

Under Ohio practice charges are first heard by a panel of three members of a standing Board of Commissioners on Grievances and Discipline. The findings and recommendation of the three-man panel are then reviewed by the full seventeen-member Board, which in turn presents findings and recommendations to the Supreme Court of Ohio (Rules of Practice, Rule XXVII, *supra*, pp. 3-5). The Supreme Court of Ohio is itself the ultimate fact finder, and said in this case:

"This court has full responsibility for determining what the facts are and what action should be taken on those facts." (A. 2a.)

The Petitioner here was the Respondent below. The charges against the Respondent in those proceedings, and their disposition, may be summarized as follows:

Charge 1. That Respondent had failed to pay certain costs assessed against him in a 1957 disciplinary proceeding. The panel itself dismissed this charge.

Charge 2. That Respondent solicited the claim of Mrs. Clara Beighley against the B. & O. Railroad. The Board of Commissioners did not agree to any conclusion on this charge.

Charge 3. That Respondent, through an authorized agent, solicited the claim of Mrs. Naomi Clark against the B. & O. Railroad. The panel and the Board sustained this charge, but the Supreme Court of Ohio could not agree that it was proven by a simple preponderance of the evidence.

Charge 4. That Respondent solicited, through Michael Orlando, the claim of Sam Cotellesse against the P. & L. E. Railroad. The panel itself dismissed this charge for want of any evidence.

Charge 5. That Respondent attempted to solicit, through Michael Orlando, the claim of James Quinn against the B. & O. Railroad. The panel itself dismissed this charge for want of any evidence.

Charge 6. That Respondent personally attempted to solicit the claim of one Andrew Buletko against the P. & L. E. Railroad. The panel itself dismissed this charge.

Charge 7. That Respondent, through Louis McKinney, solicited the claim of Mrs. Rakestraw. The panel itself dismissed this charge.

Charge 8. That Respondent advanced loans to Mrs. Beighley, Mrs. Clark, and Sam Cotellesse while handling their claims and deducted the advances from settlements later received. No evidence was offered as to Sam Cotellesse. Respondent admitted loans to his clients, Mrs. Clark and Mrs. Beighley. The panel, the Board and the Supreme Court of Ohio found that such conduct warranted suspension. The Court of Appeals did not rule that this charge warranted disbarment.

Charge 9. That Respondent promised to advance money to Andrew Masters at the time he took his case, and later did advance money during the pendency of the case. The panel and the Board found this charge was sustained, but the Supreme Court of Ohio failed to agree.

Charge 10. That Respondent was guilty of attempting to influence Elijah Doster to sign a false statement, and influenced him by paying him $50.00 The panel and the Board sustained this charge in part, finding that a payment of $50.00 was made (as a refund of medical expenses), but the Supreme Court of Ohio disagreed. It could not find payment was made with a purpose of influencing testimony.

The sole original charge, on which discipline was imposed by the Ohio Court, was the making of loans to the two widows. Further detail as to those loans will be given in the argument that such loans, under the circumstances of their making, were not improper.

During the course of the hearings before the three-man panel, counsel for the Mahoning County Bar Association, as Relator, offered four new charges as amendments to the original complaint.

Charge 11 was to the effect that Respondent attempted to intimidate the witness Sam Doster. The Board

sustained the charge. The Supreme Court of Ohio found it not proved.

Charge 12 was to the effect that Respondent attempted, through an agent, to intimidate the witness Andrew Masters. Although sustained by the Board, this charge was not sustained by the Supreme Court of Ohio.

Charge 13 was added after the Respondent Ruffalo and Michael Orlando had both testified on the solicitation charges involving Orlando, denying any procurement of cases by Orlando and describing his work as that of an investigator. The panel accepted an amendment to the complaint:

> "That Respondent did conspire with one Michael Orlando, and paid Orlando monies for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all of the time extending from 1957 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company." (A. 127a, 131a.)

The panel and the full Board sustained Charge 13. The Supreme Court of Ohio found the charge proved by the admissions of Petitioner and Orlando, made before the charge was added by amendment, and conceded after amendment. The United States District Court found that as a fact Petitioner did pay Orlando to help him prepare cases, but that this was not misconduct. The Court of Appeals for the Sixth Circuit found, two to one, that the use of Orlando in cases against the B. & O. Railroad was so unethical as to justify disbarment.

Charge 14, added by still later amendment, was to the effect that Petitioner had solicited the case of a minor child by solicitation of the parents. The panel itself dis-

missed the charge for want of evidence. (The above charges and findings are summarized in the District Court opinion. (A. 21a-23a.) The findings of the Ohio Supreme Court are reported in its opinion. (A. 1a-15a.))

We do not propose to review herein all the evidence on all the charges. The hearings were long (over 1,000 pages) and bitter. The record is extraordinary. Two officials and two investigators of the American Association of Railroads participated throughout the hearings. (A. 24a.) Evidence that the Respondent had attempted wrongfully to influence witnesses was matched by proffered evidence that the Railroad Association's representatives were warping testimony by bribery, slander and deceit. Key witnesses for the Relator were contradicted by members of their own family. One witness recanted completely. It is understandable that the Ohio Supreme Court, reviewing the hearing transcript, said:

> "The members of this court are not in agreement as to whether the facts are as the board of commissioners recommended they should be found with respect to some of the other charges against respondent." (176 Ohio St. at 269, 270, A. 9a.)

The United States District Court, reviewing the transcript, decided that its consideration would have to be limited to the two charges, No. 8 and No. 13, which were undisputed and which alone had been found sustained by the Ohio Court. (249 F. Supp. at 439, A. 29a.)

The dissenting judge in the Court of Appeals said that, being unable to agree that Charge 13 warranted disbarment, he searched the record "for a possible concurring opinion which [he] thought would be founded upon the ambulance chasing and witness tampering findings of the Ohio State Bar." He concluded:

> "To abbreviate a lengthy recital and weighing of a record of over 1,000 pages of transcript, I note that I simply could not find reliable evidence upon which to approve these findings." (370 F. 2d at 463, A. 85a.)

We deal, then, with a case that involves just two findings of fact on just two charges of unethical conduct, on both of which the evidence was freely conceded by the Respondent below, the Petitioner here. These are Charge 8 —loans to two poor clients, and Charge 13—hiring the ordinary yard laborer to help prepare railroad cases. The District Court, accepting the facts as true, refused to disbar. The Court of Appeals said it would not disbar on Charge 8 "standing alone," and that it did "not reach that question." It found that Charge 13 justified disbarment. (370 F. 2d at 450, A. 58a.)

The District Court then filed its second memorandum opinion saying that despite its "abiding conviction that [its earlier] findings and conclusions * * * are correct" it would "faithfully respect and defer to the opinions of its circuit court of appeals." (A. 87a.) It seems clear that if this Court reverses the decision of the Court of Appeals, the District Court will be free to reconsider, and will readopt its first findings and conclusions.

One final point should be noted in the statement of facts. Both the Ohio Supreme Court and the Court of Appeals justify the severe penalty of disbarment in part upon a 1957 disciplinary action against Petitioner. It is true that under an earlier type of disciplinary proceeding in Ohio, before the present Rule 27 was adopted, a complaint of solicitation was lodged in Common Pleas Court against Ruffalo late in 1956. He pleaded nolo contendere and was given private reprimand in early 1957. Charge 1 in the later proceedings was that he had not paid the costs. Evidence showed the costs had never been billed; but that

Ruffalo had ordered out the bill when the hearings began on the 1962 charges and had paid the account. (R. 16-22.) The charge was then dismissed. (R. 1024.) Petitioner has always insisted that after the consent decree in 1957 he committed no act of solicitation. The findings of fact by the courts below support him.

The charge of *old* solicitation does not justify an inference of recent solicitation, or other wrongdoing. It does have a bearing on the punishment to be meted out if Petitioner were guilty, but it is not evidence of present guilt on the new charges laid in 1962. The panel agreed fully with this principle. (A. 105a.)

The one finding of fact and issue of law squarely presented for review concerns Charge 13—the hiring of Orlando. Michael Orlando was a car inspector for the Baltimore & Ohio Railroad who worked on the night shift, from 11:00 p.m. to 7:00 a.m., bleeding the air hoses of incoming cars. In his off-duty hours and on his off days Orlando worked from time to time for the Petitioner Ruffalo. His work was described generally as investigating practically all the railroad cases, finding witnesses, and driving them to court at Petitioner's request. (A. 139a.) In addition, he advised Petitioner about the technical aspects of railroading. (A. 126a.)

Orlando was paid on the basis of $25.00 per day worked, plus his expenses. In 1957 he was paid $2,950; in 1958, $1,250; in 1959, $1,237.37; in 1960, $3,829.25; and in 1961 he was paid $2,716 for services until July, when he was hospitalized. At that time there was a dispute between Ruffalo and Orlando about the value of older services when Orlando had spent time unsuccessfully trying to locate witnesses, and accumulated unreimbursed expenses. This was settled between them at an agreed round figure of $2,000. (A. 140a.) The total figure for

the four and one half year period was $13,982.62—an average of $3,107 per annum—but no breakdown between work hours and expenses was developed in the testimony. This pay was, of course for all work in all cases, not just those in which the B. & O. Railroad happened to be involved.

The mere fact that Orlando, as a general employee of the B. & O. Railroad, did part-time work in helping to prepare cases against that railroad was held by the Ohio Supreme Court and the Court of Appeals to justify harsh discipline. Neither court cited any Canon of Ethics, any statute, or any case law precedent in support of the ruling that it is a disbarment offense for a lawyer to use, in his client's behalf, the services of an ordinary, non-fiduciary employee of the defendant in a lawsuit.

ARGUMENT.

The function of the federal courts in applying the results of a state disbarment proceeding to a federal practitioner was unanimously stated in *Theard v. United States*, 354 U. S. 278, 281-282 (1957):

> "While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. * * *
>
> Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarment by a state court, such determination of course brings title

deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling v. Radford*, 243 U. S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts."

In *Selling v. Radford*, 243 U. S. 46 at 50, 51, this Court held:

"[We] should recognize the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice we were constrained to do so."

Petitioner does not request this Court to go behind the findings of fact of the Ohio Supreme Court, nor of the Court of Appeals. This case rests upon the basic proposition that the conduct established by the record—using Orlando and making occasional small loans—far from showing want of fair character, moral turpitude or violation of any Canon of Professional Ethics was proper, permissible, and showed commendable devotion to the best interests of his clients. It was conduct which, judged by

any rational standard of a lawyer's duties, deserves no censure.

Charge 13 Does Not Charge Professional Misconduct.

Petitioner had an active trial practice, and the majority of his cases were FELA actions for injured railroad workers. The essence of good trial work is thorough preparation, and Petitioner, zealous to protect his client's interests, investigated his cases well.

The best man to investigate any case is a man familiar with the field. A truck driver knows trucking practices. A seaman knows the ways of ships. A railroader knows railroading. The work of a railroad yard is strange to an outsider. Brakemen speak in a jargon of their own, not overly intelligible to outsiders. The difference between a "kick," a "shove" and a "drop" may be a critical difference in the case. Trial evidence concerning yard layout, equipment, and local custom and practice usually necessitates calling employees from the yard or road in question, but these employees are clannish men, not likely to talk freely to a stranger. Obviously, the best man to hire to help a lawyer prepare a railroad case is a railroader, and Petitioner hired one—Michael Orlando.

There was no evidence that Orlando ever investigated any case in the yard where he worked as a car inspector. There was no evidence that he ever did any investigation work when he was supposed to be on company time. There was no credible evidence in the record that he ever solicited a case for Petitioner. He had no access to any confidential information, and no claim was made he ever revealed secret matters or breached any trust.

No question was raised as to the propriety of Orlando investigating cases against the Pennsylvania, New York Central, or other railroads. The Baltimore & Ohio was his

general employer, and both Petitioner and Orlando freely admitted that Orlando had investigated and transported witnesses in some cases involving that railroad.

This was one of the two grounds on which Petitioner was suspended by the Supreme Court of Ohio, and the sole stated ground on which he was disbarred by the Court of Appeals for the Sixth Circuit.

The charge against Petitioner, added by amendment to the original charges after Petitioner and Orlando had testified, was:

> "That Respondent [Ruffalo] did conspire with one Michael Orlando, and paid Michael Orlando moneys for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando during all of the time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company." (A. 127a. Amended to "1957" instead of 1953 at A. 131a.)

Was it "legally wrong" for Orlando to contact any witness in a lawsuit against the B. & O. Railroad? It is perfectly proper for a trial lawyer himself to interview the defendant's employees. He properly may interview *any* witness, not a party, without the consent of his opponent. The lawyer's right to interview railroad employees is protected by a special act of Congress. There used to be a standard rule forbidding the railroad employee from telling the truth to the attorney or the investigator for an injured fellow employee. He would be fired for talking to anyone but his own claim agent. Congress intervened to prevent the intimidation of employee witnesses by enacting Section 60 of Title 45, U. S. C., which strikes down as void any rule designed to prevent employees of a common carrier from furnishing information to any person in in-

terest as to the facts incident to the injury or death of any employee. The act further makes it criminal to attempt to discipline an employee for furnishing such information.

It is a valuable right, protected by federal statute, for the lawyer to interview witnesses. The effect of the decision below is to hold that the lawyer must exercise this right in person and cannot hire a fellow-employee of his own client to get the information.

Was it improper for Orlando to investigate cases when he was a general employee of the Baltimore & Ohio? The National Railroad Adjustment Board has expressly approved the practice, saying:

> "On the other hand there is no doubt whatever of the right of an employee, when off duty, to assist an injured employee or his representative in any manner including the gathering of evidence and so long as it is limited to the development of truth it cannot be regarded as disloyalty nor afford just grounds for discharge." Award No. 3624, 21 N. R. A. B. 63 (1st Div. 1939).

It was proper for the railroad employee witness to give information to Petitioner or to Orlando, and it would have been a federal crime for the railroad to attempt to prevent it. It was proper, under a National Railroad Adjustment Board ruling for Orlando to assist his fellow employee in "gathering evidence." Such conduct, leading to the development of the truth, "cannot be regarded as disloyalty," said the Board. It was proper for Ruffalo himself to find and interview witnesses. The decisions below reach a strange result in holding that what Ruffalo could properly do, what Orlando could properly do, and what the witness could properly do, became grounds for disbarment when Ruffalo had Orlando do it.

The duties of "loyalty," if any, of Petitioner and Orlando were not the same. The duty of Ruffalo as an attorney representing a client was to obtain all the evidence he could find in any way that did not require illegality, fraud, or "corruption of private trust." He had no obligation to protect the sensibilities of the B. & O. Railroad. Orlando would be expected to have some feelings of loyalty to his fellow-employees, and might be expected to have some feelings of loyalty toward his employer—but was under no mandate of loyalty to his employer when off duty. In the same way, the railroad claim department would have employees whose duty it was to investigate the claims of fellow-employees. Their "loyalty" to the employer in trying to destroy an injured employee's claim might be considered as disloyal to the fellow-employee, but certainly not immoral nor illegal.

If it be conceded that Orlando's work for Petitioner was "disloyal" to the B. & O. Railroad (but not illegal or immoral or disloyal enough to warrant discharge) does it follow that Petitioner as his second employer should be suspended? Petitioner had no duty of loyalty to the railroad defendant. His duty to his client was paramount, and it might be malpractice on his part not to use the available services of the best investigator he could get.

The Ohio Supreme Court took a different view, saying:

> "In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar." (176 Ohio St. at 269, A. 8a.)

The majority opinion of the Court of Appeals said:

> "We do not believe we should tell today's society that notwithstanding the respect we ask it to give us

> as a profession of skillful and high minded men, we do not have the ability to adequately represent our clients except through planting secret agents in the shops of those we call to account in the courts. If this kind of espionage has become a way of life in some of today's business competition, such reality should not prompt us to say that no more is expected of today's lawyers than that they conform to the minimal standards of the market place." (370 F. 2d at 453, A. 64a.)

The language is overly prim. It would compel the disbarment of every district attorney who ever used the services of a paid informant. It assumes that Ruffalo "planted" a "secret agent" when the fact is that Orlando was simply a laborer. The work of contacting witnesses and driving them to the courthouse hardly justifies the epithet of "espionage."

We do not believe that the public would be shocked if a lawyer preparing a case against an interstate motor carrier asked a driver for that carrier to come in and tell him the usual routes, truck stops and running times—and paid him for his time lost when he cooperated. The public would be more interested in knowing whether the lawyer made a good investigation, found out the truth, and represented his client well.

In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1 at 7 n. 13, this Court cited with approval a statement by Justice Roger Traynor:

> "Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty. Canons of ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified only if such a denial is necessary to suppress professional conduct

that in other cases would be injurious to the effective discharge of the profession's duties to the public. *Hildebrand v. State Bar*, 36 Cal. 2d 504, 522, 225 P. 2d 508, 519 (1950)."

To like effect it was said in *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, at 239 (1957):

> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

It is not enough to justify suspension to say that the public will respect attorneys more "as high-minded men" if an attorney never uses a paid informant or uses the facts furnished by a defendant's employee who wants to right a wrong done to a fellow-employee.

> "While it is true that a professional standard is not to be judged by lay understanding, it also is true that when a practice, which is reasonable from the laymen's point of view, runs afoul of a professional standard the burden of justification is on the profession. It is not met by a mere reiteration of a rule." Schwartz, *Group Legal Services in Perspective*, 12 UCLA L. Rev. 279, 283.

A further point should be noted. Orlando's work was concerned with FELA cases, in Pennsylvania where he lived, and in Ohio. No other state has ever held that a general railroad yard worker cannot, in his free hours, do investigative work to assist in a fellow employee's case. No canon, or rule of practice, bar association opinion, or court decision can be found which forbids the practice. Ohio has now so held, after the fact, in the

Ruffalo case, and the Court of Appeals for the Sixth Circuit has said that it cannot "find totally invalid the view" that one who uses such an "undercover agent * * * does not exhibit the fair character and integrity which should be the mark of a lawyer." (370 F. 2d at 453, A. 63a, 64a.)

This means that in Ohio, and perhaps in the four states of the Sixth Circuit, injured railroad workers will be deprived of a kind of investigative aid available to their brothers in all the other states. Claimants under FELA are not to be prevented from putting forward their claim by local oddities. This Court has said that, "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359 (1952). This principle is specifically applicable to disciplinary actions against lawyers. "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

The federal courts recognize a duty not to disbar "except upon the conviction that under the principles of right and justice [they] are constrained to do so." *Selling v. Radford*, 243 U. S. 46 at 50. The disbarment of Petitioner upon the sole ground that both he and the B. & O. Railroad used Orlando's services at different times is arbitrary, unprecedented, in derogation of the rights of FELA claimants and unsupported by any principle of right and justice.

Lawyers Are Entitled to Fair Notice of the Limits of Permissible Conduct.

It has been settled for the last one hundred years that disbarring a lawyer, presumptively to protect the public, has the effect of punishing the lawyer, and laws with such an effect must meet the tests applicable to a penal statute. *Ex parte Garland,* 4 Wall. 333 (1867). Penal statutes must give fair notice of what it is that is commanded or forbidden.

This Court has repeatedly held that:

> "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.,* 269 U. S. 385, 391.
>
> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U. S. 451, 458.
>
> "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co. v. Corporation Com. of Oklahoma,* 286 U. S. 210, 243.
>
> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits, or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania,* 382 U. S. 399, 402-3.

The dissenting judge in the Court of Appeals recognized the force of these decisions, saying:

> "In order for a lawyer properly to be found guilty of an offense and barred, perhaps forever, from the practice of his profession, he should have advance notice that the act he was charged with was an offense, and prior to his hearing he should have written notice of the charge made against him. Respondent here had neither. * * *. Even more to the point, the Ohio Bar Association and the Ohio State Supreme Court were unable to cite any canon of ethics which purported to forbid respondent's conduct in hiring Orlando. Neither do my colleagues. Nor is any prior ethics opinion or case precedent cited for the holding here." (370 F. 2d at 462, 463, A. 84a.)

The majority opinion holds that lawyers are not entitled to due process, and are compelled to guess at what some judge may later decide is morally unacceptable. The majority said:

> "They do, however, assert deprivation of due process in that prior to Ruffalo's described use of Orlando, he was never told that such would be looked upon as misconduct. They complain for him that no Canon of Ethics had ever been promulgated forbidding this practice. We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge, and then fashion and announce a Canon of Ethics to fit each act of misconduct. Surely our profession is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior." (370 F. 2d at 454, A. 65a.)

Petitioner did need a definition in advance, and he was entitled to it. He was the more entitled to it because the Rules of Practice in Ohio specifically define misconduct in terms which appear to make his actions permissible. Rule XXVII (5) says that:

> "Misconduct, as the term is used herein, means * * * any violation of the Canons of Professional Ethics * * * or the commission or conviction of a crime involving moral turpitude." (*Supra* p. 4.)

The only Canon which bears even remotely upon the matter of using Orlando's off-duty services is Canon 32, which says that a lawyer should not:

> "render any service or advice involving * * * corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public."

It is self-evident that a night-shift railroad car inspector, whose job is to bleed air hoses of incoming trains, does not exercise any private trust. Hiring such an employee to interview witnesses or drive them to court is not a crime involving moral turpitude. Petitioner did not commit any crime or violate any Canon in using Orlando's services. If it is a deprivation of due process to penalize a citizen for violating a regulation too vague and indefinite to prescribe an objective standard, it must be a greater deprivation to punish him for violating some standard of conduct which is unpublished and unenunciated.

The same argument holds true with respect to the occasional loans to the poor and afflicted. Canon 10 as written prohibited only a purchase of an interest in the very subject matter involved in the litigation. It did not prohibit loans. Canon 42 as written prohibited payment of "expenses of litigation." It did not prohibit advances to cover the expenses of eating and keeping warm. The decision of the Ohio Supreme Court which held that Petitioner violated these canons "in effect" by non-prohibited conduct amounts to a retroactive expansion of the narrow regulating language.

The situation is much the same as that in *Bouie v. Columbia,* 378 U. S. 347, where a state court had held that a statute defining criminal trespass as "entry upon the lands of another * * * after notice * * * prohibiting such entry" was violated by remaining on the premises without consent after a lawful entry. This Court said in *Bouie,* 378 U. S. 347 at 352:

> "When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required to 'speculate as to the meaning of penal statutes' as in *Lanzetta,* or to 'guess at [the statute's] meaning and differ as to its application,' as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

In summary on this point: Ohio could suspend Petitioner, under its Rules of Practice, only for "misconduct." "Misconduct" was defined as "any violation of the Canons of Professional Ethics." Petitioner's conduct did not violate any Canon. He was disbarred notwithstanding, on the ground that a lawyer "is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior."

We submit that even lawyers have the constitutionally protected right to advance definition that the Fourteenth Amendment gives to all other citizens. Due Process is flouted by a rule that a trial lawyer's livelihood will depend on the particular moral sensibility of a particular

judge on a particular day, even though none of the 47 Canons of Professional Ethics have been violated.

Petitioner Was Not Required to Prove His Innocence by Creating, Preserving and Producing Exculpatory Records.

A study of the opinions of the Ohio Court and the Court of Appeals will compel the conclusion that Petitioner was deprived of his right to practice on suspicion, innuendo and inference both unwarranted in fact and prohibited by the Fifth and Fourteenth Amendments. The court below relied heavily on the argument that Petitioner should have produced records to prove his innocence, and the absence of such records justified an inference of guilt.

In the original ten charges against Ruffalo, Charge 4 specified that he had solicited the claim of one Sam Cotellesse against the P. & L. E. Railroad through an agent, Michael Orlando; and Charge 5 specified that he solicited the case of James Quinn against the Baltimore & Ohio Railroad through an agent, Michael Orlando.

There was not a word of evidence to sustain either charge, and the three-man hearing panel dismissed them on motion at the conclusion of the Mahoning Bar Association's case. Both Ruffalo (called for cross-examination) and Orlando testified emphatically that Orlando had not solicited any cases, had not been paid for procuring cases, and had done no work except that of an investigator. Ruffalo testified that he knew the railroad would be angered and would seek reprisal against Orlando if they knew he did off-duty work for Ruffalo. (A. 122a-125a.) In an effort to protect Orlando against railroad charges and hearings Ruffalo long ago decided to pay him in cash out of an investigating fund. (A. 91a.) Ruffalo kept a record of annual disbursements for income tax reporting, and

brought in the income tax information forms. Orlando reported his income and expense, and offered to bring in his tax returns.

The Chairman of the hearing panel then requested Ruffalo to bring in all his records—ledger books, checks, and all other records of income and expense. Ruffalo protested, saying that only records of payments to Orlando had been subpoenaed, and he had produced the Form 1099 records which gave that information.

Petitioner said:

> "I don't think they should have a right to just go down through my ledger and look at everything that is in my ledger * * *. I wish to object to it strongly. I think it is entirely improper * * * just to go through my records here to find out what they can find of any kind of a nature that they might try to throw against me here in this thing and to amend their complaint on what I did here, I don't think they should do that." (A. 106a-107a.)

The Chairman did not pursue his request for records beyond those subpoenaed after the protest by Petitioner, and had the record show that the papers showing record of payment had been produced as called for by the subpoena. (A. 108a.)

The majority opinion of the Ohio Supreme Court said:

> "Why did respondent (Ruffalo) not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis they were no longer needed to sustain their income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando * * *. It is difficult to believe that the 1961 federal income tax returns of either Orlando

or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any *records showing either of them to be innocent of charges of soliciting would be helpful to both.* It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B. & O. and against Ruffalo in the proceedings brought against him." (176 Ohio St. at 268-269, Emphasis added. A. 7a, 8a.)

The Court of Appeals for the Sixth Circuit adopted a rule of guilt by suspicion, saying:

"Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this Court *had, and have, the right to draw inferences as to what this conduct portrays.* The absence of records would not hide *what was going on* if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?" (370 F. 2d at 453, A. 64a. Emphasis added.)

These statements show absolute disregard for Ruffalo's constitutional rights. Let us assume for purpose of argument that Ruffalo was really guilty of solicitation through Orlando. If he were, then he had his Fifth Amendment right, absorbed into the Fourteenth, to refuse to produce records which showed it. If he did refuse, then no inference could be drawn therefrom and the penalty of disbarment could not be inflicted as the price of asserting the privilege. *Spevak v. Klein,* 385 U. S. 511 (1967).

If Ruffalo had a right not to produce any records he certainly had the corollary right to destroy any records he

did have. If he had a right to destroy them, he must certainly have the right not to create self-incriminating records in the first instance.

The privilege against Self-Incrimination must include the right not to make records and not to keep records, as well as the right not to produce them. If Ruffalo were really guilty of solicitation, then no suspicion of guilt, or inference of guilt, drawn from a destruction of receipts or a failure to keep detailed financial records could justify his disbarment.

Assume on the other hand that Ruffalo is as innocent of the unproved charge of solicitation as he insists he is. When demand for the records was made he refused, properly, to produce his general financial records, and said that any detailed records as to Orlando were either never in existence or were, in the case of old cash receipts, discarded. He produced the only records he had—the income tax forms giving annual totals. If he denies guilt, is he required to produce records to prove affirmatively his innocence? This would lead to the incredible result that constitutional immunities protect only the guilty and not the guiltless.

Petitioner's failure to create and preserve records to prove his innocence cannot give the United States Court of Appeals the right it claims "to draw inferences as to what this conduct portrays," on the stated ground that there is nothing "to fear from honest record keeping."

This Court has held that the Fifth Amendment, operating through the Fourteenth, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U. S. 609 at 615. It is wholly inconsistent with that principle that an inference of guilt can be drawn from the failure to keep and to produce records which

would establish innocence. The assertion that the court below could infer "what was going on" from the absence of records is contradicted by *Malloy v. Hogan,* 378 U. S. 1 and *Spevack v. Klein,* 385 U. S. 511 (1967). The State of Ohio, it must be noted, does not compel its bar to keep any records at all. The lawyers duties will require him to account to his client, and to the internal revenue service, but he is not required to keep books in order to account to a disciplinary board.

SUPPLEMENTAL BRIEF ON CHARGE 8— LOANS TO CLIENTS.

Lending Sustenance to Oppressed Clients Is Not Equivalent to Misconduct.

The Ohio Supreme Court imposed indefinite suspension of Petitioner on Charge 8—advancing support to two clients. The Court of Appeals did not disbar upon that ground. We brief the point against the possibility some of the members of this Court might feel that even though Charge 13 would not justify disbarment, Charge 8 would. If it is the pleasure of this Court only to review the single ground stated by the Court of Appeals in support of its decision to disbar Petitioner, then no consideration need be given to this section of the brief.

The facts with respect to the loans to two clients are not in dispute. Clara Beighley and Naomi Clark were both widowed by the death of their husbands in railroad accidents. Petitioner represented both of them in FELA actions. It is admitted that over a period of four years Petitioner advanced to Mrs. Beighley $1,025.00 and that he advanced to Mrs. Clark $611.00 over a period of three and one-half years. These loans were made at various times, in modest individual amounts, beginning some months after the widows had retained Petitioner, and were made

at their supplication to buy necessities for survival. The amount of such advances were repaid by the clients out of the settlements later obtained in both of these cases. Petitioner testified that he did *not* offer to advance money to these clients in order to obtain their lawsuits (A. 115a), and there is no evidence to the contrary with regard to this. The Supreme Court of Ohio, overruling earlier decisions, held that these advances violated Canons 10 and 42 of the American Bar Association, and justified suspension of Petitioner's right to practice.

The Court's opinion says:

> "It is obvious that, where the advancement of living expense is made, as in the instant case, *to enable a disabled client and his family to survive,* any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. *In effect,* the attorney has purchased an interest in the subject matter of the litigation that he is conducting." (176 Ohio St. at 265. Emphasis added. Appendix 3a.)

This is extraordinary analysis. The court found that in the instant case the client's family was in desperate straits and could not survive without help. Would it then be the lawyer's duty to settle cheap, to avoid the economic strangulation of his client? It would be a strange moral code that would applaud starvation as an ethical defense weapon. It is peculiar morality that would compel a lawyer to stand by, unmoved by any sense of charity, while the widow and children he represents suffer loss of the family furniture, loss of heat and light, loss of clothing, or loss of food from the table. A lawyer admitted to practice before the Federal Bar ought to be able to lend to impoverished clients the funds essential to main-

tain life. In doing so he is the more charitable if the case is so doubtful that he might never be repaid. He is the more charitable if, after the loss of the case, he foregoes his ability to take judgment and garnish the pension payment, and instead makes a gift of the monies loaned to his defeated clients.

It may well be, as it was in fact in one of the instant cases, that the liability is clear and eventual recovery is reasonably certain. In such case there is no true charity in the loan. It becomes a perfectly reasonable transaction in which a client with good security—the pending case—has urgent existing need. In such a situation the lawyer protects the client and protects his own contingent interest by making the loan which enables the client to resist inadequate settlement offers and still survive until trial time. Where liability is doubtful, and security for repayment non-existent, the lawyer is the more humane. Is he then the more immoral?

The weakness of the Ohio Supreme Court's position becomes instantly apparent when we consider that a contingent fee is universally held to be ethical and proper. It is commonplace for a plaintiff's attorney to represent his client for a quarter interest or third interest in the eventual recovery. He gives consideration—his professional services. He acquires an interest in the proceeds of the case by trading the value of his work. He may also advance expenses, subject to an obligation to reimburse—even though there may not be much expectation of reimbursement if the case is lost and his client is penniless. Let us assume that a lawyer who has a one-third contingent fee and has advanced $200.00 in expenses makes three monthly finance payments to save his client's furniture amounting to perhaps $240.00. It is ethical, says the Supreme Court of Ohio, for the lawyer to own

one-third of the proceeds of the case. It is ethical for the lawyer to advance the $200.00 in litigation expenses and reimburse himself from the eventual settlement. What then is the alchemy which makes it unethical, immoral, and reprehensible for the lawyer to make a further loan for his needy client's living expenses?

A good, kind, and generous act cannot be made bad merely by calling it bad. A great majority of our people would consider that a helping hand to the oppressed is good, following the teaching of St. Matthew:

> "When saw we thee ahungered, and fed thee? or thirsty, and gave thee drink * * * or naked, and clothed thee? * * * Inasmuch as ye have done it unto one of the least of these, my brethren, ye have done it unto me."

Canon 10 does not prohibit benevolence. Canon 10 is a specific prohibition against the practice known to the common law as champerty. The essence of champerty is the purchase of an interest *in the subject matter* of the litigation, classically an interest in land. Historically the doctrine goes back to the thirteenth century when church and crown contested over titles to land, and powerful feudal barons sometimes intervened to help a freeholder in return for a share of the property. Winfield, in "The History of Maintenance and Champerty," 35 L. Q. Rev. 50, 56-59 (1919) says that the first statute to mention champerty by name was 13 Edw. 1 (St. West. 11) wherein Cap. 49 enacts:

> "The Chancellor, Treasurer, Justices, nor any of the King's house, Clerk ne lay, shall not receive any church nor advowson of a church, land nor tenement in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers, nor shall take no reward thereof. * * *."

Centuries later Blackstone defined champerty with a broader meaning:

> "In our sense of the word it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at common law, because no man should purchase any pretence to sue in another's right." (4 *Blackstone, Commentaries,* 135 [3d Ed. 1884]).

A modern scholar, writing on the general subject of maintenance and champerty, observes that the rule of Blackstone's day has been modified, but still restricts purchase of claims by lawyers:

> "However, the power to assign causes of action has been greatly extended and, in general, such rights are freely transferable * * * The position of the lawyer in regard to assignments has been treated as requiring special restrictions. Because of their ability to evaluate a claim more accurately than the assignor, and because of a fear of abuses in professional conduct if lawyers are allowed to buy claims to litigate for their personal profit, assignment or purchase of property in litigation by lawyers is specifically prohibited by many modern statutes." (F. B. MacKinnon, "Contingent Fees for Legal Services—A Report of The American Bar Foundation." [1964] p. 38.)

A leading modern text on professional ethics, "Legal Ethics" by Henry Drinker (1953) says this about Canon 10:

> "This Canon must be read in connection with Canon 28 forbidding the stirring up of litigation, as part of the age-long policy which gave rise to the statutes against champerty, maintenance and barratry. Its purpose is to prevent lawyers from the temptation to litigate on their own account. Significantly,

> the Canon uses the term 'purchase', not 'acquire' * * * Nor, despite some statements to the contrary in Committee opinions, is it believed that, particularly in view of Canon 13 [allowing a contingent fee]. Canon 10 precludes in every case an arrangement to make the lawyer's fee payable only out of the results of the litigation. The distinction is between buying an interest in the litigation as a speculation, which Canon 10 condemns, and agreeing, in a case which the lawyer undertakes primarily in his professional capacity, to accept his compensation contingent on the outcome." (Drinker, "Legal Ethics" [1953] p. 99.)

One of the earliest codes of ethical standards in this country was Hoffman's Fifty Resolutions in Regard to Personal Deportment, written by David Hoffman of the Baltimore Bar for the guidance of young practitioners in 1836. They are reproduced in Appendix E of Drinker's "Legal Ethics" pp. 338-351. Hoffman's Resolution XXIV provides, in significant part:

> "I will never be tempted by any pecuniary advantage, however great, nor be persuaded by any appeal to my feelings, however strong, to purchase, in whole or in part, my client's cause. *Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so.* But in no case will I permit either my benevolence or avarice, his wants or his ignorance, to seduce me into any participation of his pending claim or defense * * *. And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible, the taking of contingent fee * * *. Were this denied to the poor man, he could neither prosecute nor defend. All of this differs essentially from the object of my resolution, which is against purchasing, in whole or in part, my client's rights, after the relation of client and counsel, in respect to it, has been fully

established—after the strength of his case has become known to me—after his total pecuniary ability is equally known—after expenses have been incurred which he is unable to meet—*after he stands to me in the relation of a debtor and after he desires money from me in exchange for his pending rights* * * *." (Emphasis added.)

It must be apparent from the history of the doctrine of champerty, and the statutes, resolutions and canons condemning it, that the evil of the practice is the speculation for profit in the outcome of the case. A lawyer may not buy at a fixed price an individual interest in the land in litigation, nor a percentage of the recovery in a contested claim. In the instant case, the Petitioner, Ruffalo, did not purchase anything. He bought no rights in the litigation. He did not speculate, and could not profit from his kindness. He simply made a loan to a desperately needy client. At best, he could recover the exact amount of the loan. At worst, he would be a creditor holding an uncollectible debt. He stood in the relation of creditor to debtor—which Hoffman approved. He did not exchange the debt for an interest in his client's rights. He acquired no interest in the *subject matter* of the litigation, which was an unliquidated claim for uncertain damages.

The Supreme Court of Ohio said that making a survival loan to a needy client was "in effect" the purchase of an interest in the subject matter. To say that a loan is "in effect" a purchase is an outright distortion; it violates Drinker's admonition that the difference between "purchase" and "acquire" is significant. Furthermore, the Petitioner did not acquire any "interest" in his client's rights. He acquired only a debt, which could not be enlarged beyond its fixed dollar amount no matter how great the recovery might be. It will not do to say that an attorney

who has in fact made a loan has "in effect" made a "purchase." This does not interpret Canon 10. It rewrites it.

The Ohio Supreme Court held further that making a loan so that a client could buy food is a violation of Canon 42, which reads:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement."

The only prohibition in this Canon is the prohibition against bearing the expenses of litigation. There is no prohibition whatever against paying the expenses of sustenance. Even as to expenses of litigation the prohibition is qualified—the lawyer may advance them. The fact that Canon 42 says that an attorney may advance litigation expenses subject to reimbursement does not make it say that those are the only advances that can be made. The more rational interpretation of the Canon is that when it forbids the lawyer from paying or bearing the expenses of litigation, it means only the expenses of litigation and not the expenses of living.

It does not, and should not prevent the lawyer from advancing—by loan or gift—the cost of essential corrective surgery or the cost of rehabilitation training to help his injured client return to work. If the Canon really means that a lawyer cannot advance any monies for the purpose of client survival, then it would be a simple matter for the draftsman to have said so. In view of the impressive body of precedent expressly approving survival loans to needy clients, the draftsman of the Canons should and would have stated the prohibition of such loans explicitly if that had been intended.

Hoffman, in his famous Resolutions, had said of impoverished clients as early as 1836:

> "Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, * * *." (Hoffman's Resolution XXIV, *supra.*)

The Minnesota Supreme Court in 1915 said in *Johnson v. Great Northern Ry. Co.*, 128 Minn. 365, 369-370, 151 N. W. 125, 127:

> "The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may, in a sense, tend to foment litigation by preventing a settlement from necessity; but we are aware of no authority holding that it is against public policy, or of any sound reason why it should be so considered."
>
> "It is generally held that a person, whether an attorney or layman, who furnishes assistance by money or otherwise to a poor man to enable him to carry on an action, is not guilty of maintenance * * *. *It is not against public policy for an attorney to loan his client money to enable him to carry on the suit.*" (Emphasis added.)

The year before the Ohio Supreme Court disciplined the Petitioner, the Connecticut Supreme Court had approved the conduct in question in *Grievance Committee of Fairfield County Bar v. Nevas,* 139 Conn. 660, 666-667, 96 A. 2d 802, 805 (1963) saying:

> "By loaning money to his client, the defendant put himself in a position where his personal interests might well become adverse to hers. The making of such a loan by a lawyer is not, however, necessarily unethical conduct. *It is unethical only if the loan is made to accomplish some purpose contrary to the client's welfare or if, in seeking repayment, the lawyer pursues practices which are unfair or unduly oppressive.*" (Emphasis added.)

In *People, ex rel. Chicago Bar Ass'n v. McCallum,* 341 Ill. 578, 589-590, 175 N. E. 827, 831 (1930) the Illinois Supreme Court said:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim."

There is much other authority to the same effect: *Hildebrand v. State Bar,* 18 Cal. 2d.816, 824, 117 P. 2d 860, 863 (1941); *In re Sizer,* 306 Mo. 356, 375, 267 S. W. 922, 928 (1924); *Bank of Chenango v. Hyde,* 4 Cow. 567 (N. Y. 1825); *State ex rel. The Florida Bar v. Dawson,* 111 So. 2d 427, 430 (Fla. 1959); *Reece v. Kyle,* 49 Ohio St. 475, 31 N. E. 747 (1892).

The Ohio Supreme Court said:

> "We cannot reconcile the majority opinion in *People ex rel Chicago Bar Association v. McCallum* (1930) 341 Ill. 578, 173 N. E. 827, on this question with Canons 10 and 42." (176 Ohio St. at 265, A. 3a.)

It would have been more accurate to say that *McCallum* and all the cases like it cannot be reconciled with the language that the Court wrote into Canons 10 and 42 by its distorted interpretation. Canon 10 forbids the purchase of an interest in the subject matter of the litigation. Canon 42 prohibits the payment of the expenses of litigation. *McCallum* approved loans of living expenses to needy clients. There is no conflict to reconcile.

There was a direct conflict between the decision of the Ohio Supreme Court in Petitioner's case and its earlier decision approving loans to poor clients in *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747. The Court observed that its earlier line of decisions, including *Reece v. Kyle*, where decided before the Court adopted the Canons of Professional Ethics, and said:

> "In view of the adoption of those canons, those cases would be no longer applicable to the extent that they are inconsistent with provisions of the canons." (176 Ohio St. at 265, A. 3a, 4a.)

Petitioner insists that there is no inconsistency. There is no provision of the Canons which describes and forbids the aid and assistance he gave. The state court reached its result only by holding that "in effect" he violated a new and retroactive interpretation of the Canons. The result denies Due Process on multiple grounds—lack of advance definition, retroactive interpretation of the Rules of Practice defining misconduct, retroactive enlargement of the narrow language of Canons 10 and 42, ex post facto overruling of prior precedent approving the practice, and a decision so arbitrary and irrational it cannot be reconciled with any reasonable standard of morality and justice.

CONCLUSION.

Petitioner asks this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit, and order that court to reinstate his name upon the roll of counsel entitled to practice before it. Petitioner asks further that this Court grant him the right to continue to practice as a member of its bar.

Respectfully submitted,

CRAIG SPANGENBERG,
1500 National City Bank Building,
Cleveland, Ohio 44114,
Counsel for Petitioner.

SUPREME COURT, U. S.

FILED

DEC 23 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF OHIO STATE BAR ASSOCIATION and MAHONING COUNTY BAR ASSOCIATION, in Support of Judgment Below.

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL T. GAINES,
700 Union Commerce Building,
Cleveland, Ohio 44115,

WALTER A. PORTER,
Talbott Tower,
Dayton, Ohio 45402,

P. PAUL PUSATERI,
137 West Main Street,
Wilmington, Ohio 45177,

JOHN R. WELCH,
33 West 11 Avenue,
Columbus, Ohio 43201,
Counsel for
Ohio State Bar Association.

December 20, 1967.

(Other Counsel on inside of cover.)

PAUL J. FLEMING,
1106 Union Bank,
Youngstown, Ohio 44503,

JACK C. HARRIS,
1106 Mahoning Bank Building,
Youngstown, Ohio 44503,

HENRY C. ROBINSON,
305 Legal Arts Centre,
Youngstown, Ohio 44503,

Counsel for
Mahoning County Bar Association.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF JOHN RUFFALO, JR.,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF OHIO STATE BAR ASSOCIATION and MAHONING COUNTY BAR ASSOCIATION, in Support of Judgment Below.

This brief is filed by the Ohio State Bar Association and the Mahoning County Bar Association in support of the judgment of the United States Court of Appeals for the Sixth Circuit disbarring Petitioner from practice before that court "until the further order" of that court. 370 F.2d 447 (A. 1, 53a-85a).

APPLICABLE RULE.

Petitioner Ruffalo quotes (pp. 2-3 and 6) the Fifth and Fourteenth Amendments, 45 U.S.C. 60, and Canons 10 and 42, none of which, for reasons to be stated, is believed to be here applicable. The Ohio Supreme Court's, and this Court's, disciplinary Rules also quoted (pp. 3-6) are tangentially involved. The only Rule which is directly applicable, Rule 6(3) of the United States Court of Appeals for the Sixth Circuit, Petitioner Ruffalo does not quote. The Sixth Circuit's Rule says:

"When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court."

QUESTIONS PRESENTED.

This case presents the questions:

1. Whether a lawyer who hires a workman as an undercover agent to investigate and prepare lawsuits against his employer may be disbarred for such conduct.
2. Whether a lawyer charged with such conduct may excuse it on the ground he did not know it was wrong and was not warned by specific Canon.

Petitioner Ruffalo suggests that the Record presents the further questions (pp. 6-7):

(a) Whether Petitioner was "required to make book entries" and produce them, and

(b) Whether maintaining clients by cash payments is misconduct,

but, it is believed, for reasons that will be developed, these questions are not properly here.

STATEMENT OF THE CASE.

The Court of Appeals, whose judgment is under review, acted upon a show-cause order issued by it upon receipt of the certificate of the Ohio Supreme Court concerning proceedings involving Petitioner Ruffalo in that court. It should, therefore, be noticed that—

—Petitioner Was Suspended by State Court.

Petitioner Ruffalo, admitted to the Ohio Bar in 1946 (A. 90a), was suspended on May 20, 1964, from practice by the Supreme Court of Ohio, 176 Ohio St. 263 (A. 1a-15a) on two grounds:

1. *Charge 13:* Hiring one Michael Orlando, a Baltimore & Ohio Railroad Company employee, to prepare, as an undercover agent, without the knowledge of his railroad employer, lawsuits against his employer, the B & O.
2. *Charge 8:* Maintaining clients by cash payments to them, one for a period of four years (A. 115a-116a), and another over a period of three and one-half years. (A. 117a-118a.)

Of the 14 charges made against Petitioner Ruffalo in the state proceedings by the Ohio Supreme Court Board of Commissioners on Grievances and Discipline, the Board sustained seven; as to five of these seven charges, the Ohio Supreme Court was "not in agreement as to whether the facts are as the board of commissioners recommended," 176 Ohio St. at 269-270 (A. 9a); however, the court upheld the two charges, 13 and 8, above mentioned. Concerning these two charges, as Petitioner Ruffalo agrees, there is no dispute of fact. (Petitioner's brief, pp. 7, 8, 16.)

The judgment of the Supreme Court of Ohio, *Mahoning County Bar Association v. Ruffalo* (1964), 176 Ohio

St. 263, 199 N.E.2d 396 (A. 1a-15a), became final on December 7, 1964, upon denial of certiorari here. 379 U.S. 931. The correctness of that judgment is not challenged by Petitioner Ruffalo.

(i) Nature of State Proceedings.

Disciplinary proceedings in Ohio are under the exclusive jurisdiction of the Ohio Supreme Court.[1]

Pursuant to its Rule XVIII (which is the same as the court's prior Rule XXVII as amended) the Ohio Supreme Court, as of January 1, 1957, put discipline in the hands of a Board of Commissioners on Grievances and Discipline consisting of 17 lawyers appointed by the Supreme Court, one from each of 17 districts in the state, each to serve a term of three years. Under the Rule, charges are heard by a panel of three members of the Board (including, in Petitioner Ruffalo's case, a former judge of the Supreme Court of Ohio), are reviewed by the entire Board of 17, and are then heard by the Supreme Court of Ohio.

That is the procedure followed in the Ohio proceedings that led to Petitioner Ruffalo's suspension by the Supreme Court of Ohio. Hearings were held by the panel:

December 26, 1962 (A. 89a, R. 3);
December 27, 1962 (A. 98a, R. 256);
December 28, 1962 (A. 104a, R. 534);
July 19, 1963 (R. 806);
August 16, 1963 (A. 135a, R. 831);

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[1] The history of discipline of the Bar in Ohio may be found in *Lawyer Discipline: The Ohio Story* (1967), by Professor Oliver Shroeder, Jr., of the Western Reserve University Law School, and in *Conduct of Attorneys*, 16 Western Reserve Law Review 893, by Samuel T. Gaines. The Ohio Supreme Court has asserted its exclusive jurisdiction of the subject of discipline in a series of cases: *In Re Nevius* (1963), 174 Ohio St. 560, 191

(Continued on following page)

and a Record of 1,034 pages was taken (all of which is lodged with this Court). Petitioner Ruffalo participated in the proceedings and also was there represented by counsel. (A. 89a, 122a, 135a.)

The significance of the Ohio Supreme Court's judgment of suspension, rather than disbarment, explained in *Cleveland Bar Association v. Pleasant* (1958), 167 Ohio St. 325, 326-327, 148 N.E.2d 493, and *In Re Nevius* (1963), 174 Ohio St. 560, 562, 566-567, 191 N.E.2d 166, is that, a lawyer disbarred, is disbarred "for life with no possibility for reinstatement," 174 Ohio St. at 566, whereas a lawyer suspended, may apply for reinstatement after two years.

This distinction between suspension and disbarment, observed in the state practice, does not prevail in the Sixth Circuit; the judgment there entered, and here challenged, strikes Petitioner "from the roll of counsel," such discipline to "remain in force until the further order" of that court. (A. 1.)

(ii) Charge of Hiring B. & O. Employee as Undercover Agent.

The proceedings as printed in the Appendix (consisting of two volumes) are not in chronological order; instead all of the testimony of a given witness is there collected in one place and all colloquy in one place. This is a convenience, but it gives the impression that the

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(Continued from preceding page)

N.E.2d 166; *Mahoning County Bar Association v. Franko* (1958), 168 Ohio St. 17, 151 N.E.2d 17, certiorari denied (1958), 358 U. S. 932; *Cleveland Bar Association v. Pleasant* (1958), 167 Ohio St. 325, 148 N.E.2d 493, certiorari denied (1958), 358 U. S. 842; *In Re McBride* (1956), 164 Ohio St. 419, 132 N.E.2d 113, certiorari denied (1956), 351 U. S. 965; and *In Re Thatcher* (1909), 80 Ohio St. 492, 93 N.E. 895, appeal dismissed (1909), 216 U. S. 625.

charge of hiring B. & O. employee Michael Orlando as an undercover agent (which is the charge on which the Sixth Circuit disbarred), came late in the proceedings, after Petitioner had told the full story without knowing this was a charge of misconduct, and, without opportunity to respond.

Actually, the charge of hiring Orlando as an undercover agent was added on December 28, 1962, at the close of the morning session of the third day of hearings (A. 127a, 131a) and was based chiefly (A. 130a) on the testimony of Orlando. (A. 137a-150a.) Charge 13, made as an amendment, charged:

> "That Respondent did conspire with one, Michael Orlando, and paid Michael Orlando moneys for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all the periods of time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company." (A. 127a.)

Although Orlando had worked as an investigator for Petitioner Ruffalo "since 1953" (A. 138a), and continued until July 18, 1961 (A. 138a), Charge 13 was amended at Petitioner Ruffalo's request at the afternoon session on December 28, 1962, to aver that the employment of Orlando covered: "the periods of time extending from '57 to 1961." (A. 131a.) Petitioner Ruffalo requested that this change be made because:

> "These matters dealing here with the particular Specifications in the complaint before this Court deal with matters from 1957 to '61. Any matters before that time are not now particularly within the province of this Panel. And I would like to amend it in that respect." (A. 131a.)

Petitioner Ruffalo's request to change the beginning date from 1953 to 1957 was allowed. (A. 131a.) As so amended, Charge 13 was sustained by the Supreme Court of Ohio and it is the charge on which the Sixth Circuit acted. 370 F.2d at 450 (A. 57a).

(iii) Opportunity to Answer Was Given.

The panel, in the state proceedings, made clear that Petitioner Ruffalo could have whatever time he might need to meet the charge thus added. (A. 127a, 128a, 132a.) The next hearing (R. 806) was not held until July 19, 1963 (nearly seven months after the charge was made) and this was followed by a further hearing a month later on August 16, 1963. (A. 135a.)

Petitioner Ruffalo does not claim that he was not given adequate time or opportunity to respond to the charge.

(iv) Nature of Orlando's Work for Petitioner Ruffalo.

Orlando testified that he worked for Ruffalo as "an investigator." (A. 138a.) He added:

> "we consult one another on lawsuits; I transport witnesses. I am with him—when he is filing these lawsuits, I mean as he is trying these lawsuits in Federal Court in Pittsburgh, Cleveland, Warren, whatever court, I am with him two or three days, four days, whatever time it takes." (A. 139a.)

Petitioner Ruffalo confirmed the fact that he hired Orlando "as an investigator." (A. 118a.) "He is a fact-finding person * * *." (A. 126a.) Ruffalo testified:

> "His job specifically has been to investigate cases which I turn over to him to investigate, particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge

and the operation of railroads, and on occasions to transport witnesses for me." (A. 118a-119a.)

(v) Petitioner Ruffalo Hid His Employment of Orlando as an Undercover Agent from Orlando's Employer B. & O.

Petitioner Ruffalo paid other investigators by check (A. 95a), but he paid Orlando in cash (A. 93a, 95a), and kept no record of these payments. (A. 93a, 95a, 99a.) This was "Because he was an employee of the B. & O. Railroad" (A. 94a), and "we didn't want it to be known, in case any question came out about it, that he was a B. & O. employee who was doing investigating work for me." (A. 95a, 101a, 120a.) Ruffalo said:

> "we kept it that way for the particular fact that he was working for the B. & O. Railroad, and we didn't want to get him involved with the B. & O. Railroad." (A. 93a.)

Ruffalo paid Orlando $25 per day plus expenses for his work. (A. 119a, 139a, 142a.) Orlando had steady work with the B. & O. five days a week (A. 142a, 146a); at the same time he worked for Ruffalo "an average" of "10 or 15 days a month." (A. 139a.) He continued to work for Ruffalo until July 18, 1961. (A. 138a.) On that date his dual employment for Ruffalo and the B. & O. terminated. At the hearing of December 26, 1962, Ruffalo testified:

> "Q. * * * Mike Orlando hasn't been an employee of the B. & O. Railroad for better than a year and a half, has he?
>
> A. That's right.
>
> Q. You have paid him money in that interim?
>
> A. I have not.
>
> Q. You have not? You haven't paid him a dime since he was discharged by the B. & O. in Akron?
>
> A. (Shaking head.)

Q. You mean that?
A. No, I haven't." (A. 95a-96a.)

The total amounts paid by Ruffalo to Orlando were disclosed by Ruffalo, as shown by his income tax information returns, Form 1099, filed with the United States Treasury. Ruffalo reported to the Treasury, for income tax purposes, that he paid Orlando the following amounts (A. 110a):

Year	Amounts Reported to Internal Revenue Service as Paid to Orlando
1957	$2,950.00
1958	1,250.00
1959	1,273.37
1960	3,829.25
1961 (To July 18)	4,716.00
Total	$14,018.62

(vi) Petitioner Ruffalo Was Not Disciplined For Hiring an Investigator But For Hiring an Employee to Work, as an Undercover Agent, on Cases Against His Employer.

The discipline recommended by the trial panel, and by the Board of Commissioners, was based not on the ground that Petitioner Ruffalo had hired an investigator, but on the ground that he had hired an employee to work, as an undercover agent, on cases against his own employer. The following will indicate the views of the Commissioners and of Petitioner Ruffalo on this subject:

"MR. BIERCE: Mr. Ruffalo, here is a man working for the B. & O. Railroad; he is doing investigating work for you. You failed to keep the records. Was it because you knew that he was working in effect against his own employer, his other employer, and you were covering it up by destroying the records? Now, is that a fact?

MR. RUFFALO: The fact was we knew that he as a railroad employee might be subject to some censure by his company if they knew that he was working for me as an investigator. They don't like it. But he has a perfect right to do that, as long as he does not go on their property or take photographs on their property or do anything like that. His time is his own.

MR. BIERCE: He was working on your cases that were against the B. & O. Railroad, wasn't he?

MR. RUFFALO: He did on some, yes.

CHAIRMAN BEIRNE: On the Naomi Clark case, he said he did.

MR. RUFFALO: Oh, yes.

MR. BIERCE: He was working against the B. & O., and isn't that the reason that both of you have no records of the work that he did for you as an investigator; because he was working on cases against his own employer?

MR. RUFFALO: That's right. That was to protect him.

MR. BIERCE: You knew that?

MR. RUFFALO: Oh, yes, I knew it and—

MR. BIERCE: And you took part in it?

MR. RUFFALO: There was nothing wrong with it. It was perfectly proper for him to be able to do those things.

CHAIRMAN BEIRNE: Mr. Ruffalo, do you think it is not improper for an employee to work on cases against his employer, especially without his employer's knowledge?

MR. RUFFALO: On his own time, in his time off, he has a right to do whatever he wishes.

CHAIRMAN BEIRNE: Even against his own employer? Do you think his allegiance to his employer ceases when he punches a timeclock?

MR. RUFFALO: Lots of people hold down two jobs. Lots of people take another job—

CHAIRMAN BEIRNE: I am not questioning that. I am questioning the right of an employee to work

with a lawyer in suits against his own employer while he is on the payroll of his employer. Do you think there is nothing wrong with that?

MR. RUFFALO: I don't see that there was anything wrong in what he was doing in investigating a case which he had not in any way brought into my office or had anything to do with.

MR. BIERCE: If you thought that, why didn't you keep all these records? Why did you destroy everything so there would be no records of anything, if you thought it was perfectly aboveboard and perfectly all right?

MR. RUFFALO: I tried to protect him from any eventuality of this kind, that's all.

JUDGE MIDDLETON: Because you knew it wasn't right; you knew that this was morally wrong?

MR. RUFFALO: No, I didn't interpret it as being morally wrong." (A. 123a-124a.)

The discussion went on:

"JUDGE MIDDLETON: And you think that is all right?

MR. RUFFALO: Well, I can see no wrong in a man doing it on his own time.

CHAIRMAN BEIRNE: Even against his own employer?

MR. RUFFALO: Well, he is not really against his own employer.

CHAIRMAN BEIRNE: Well, that is my question to you. Even if it is against his own employer; you make no distinction?

MR. RUFFALO: No, I don't see that it is wrong. It is his time. I think our concepts have changed from the time when a man went to work in the mill and he worked 14 hours a day and he was owned by the boss and—." (A. 126a-127a.)

The Ohio Supreme Court, as to this charge, concluded:

"In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar. He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so." 176 Ohio St. at 269 (A. 8a).

—Proceedings in District Court.

Upon receipt of the Ohio Supreme Court's certificate the United States District Court for the Northern District of Ohio issued a show-cause order, and, upon hearing, concluded that Petitioner Ruffalo should not be disbarred. *In Re Ruffalo* (N.D. Ohio, 1965), 249 F.Supp. 432 (A. 16a-52a).

The District Court, Judge Battisti, considered (A. 29a) the two charges the Ohio Supreme Court had upheld, and disagreeing with that court, said:

1. It was not misconduct to hire the undercover agent. The District Judge pointed out that "it might have been the soundest and most appropriate course of action for the Respondent to have limited Orlando's investigative work to cases other than those involving the Baltimore & Ohio Railroad," 249 F. Supp. at 446 (A. 44a), and recognized that such employment "might well be fraught with difficulties, and * * * the regular employer might well be sensitive in this regard," 249 F. Supp. at 446 (A. 43a, 45a), but held this was not ground for disbarment because the evidence did not show "that Respondent caused Orlando to engage in unfair and unethical practices * * *." 249 F. Supp. at 450 (A. 51a).
2. It was not misconduct to make cash advances to clients. The District Judge concluded "it would

> be unreasonable to find that the making of these loans by the Respondent constituted a practice calculated to solicit employment by others or as a gimmick to unethically advertise his services." 249 F.Supp. at 443 (A. 37a).

Upon then learning that the Sixth Circuit had started its own proceedings, Judge Battisti, in the District Court, deferred the entry of an order "pending a decision by that Court." 249 F.Supp. at 450 (A. 52a). When the Sixth Circuit's decision issued, Judge Battisti entered, in the District Court, an order suspending Petitioner Ruffalo from practice until further order. (A. 86a-87a.)

No appeal was taken from the District Court's judgment.

—Proceedings in Court of Appeals.

The Court of Appeals, in its independent consideration of the return on the show-cause order it had entered, ruled only on the question whether it was misconduct to hire Orlando as an undercover agent to investigate, and obtain evidence, "to be used in Ruffalo's cases against Orlando's own employer, the B. & O." 370 F.2d at 451 (A. 59a). The majority, Judges O'Sullivan and Phillips, concluded:

> "an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be a mark of a lawyer." 370 F.2d at 453 (A. 63a-64a).

The Court did not pass on the question whether it also was misconduct to make cash advances to clients. "We do not reach that question." 370 F.2d at 450 (A. 58a).

The judgment the Sixth Circuit entered was that Petitioner be:

> "stricken from the roll of counsel permitted to practice before this court. This discipline shall remain in force until the further order of this court." (A. 1.)

Judge Edwards dissented.

As to the impropriety of hiring the opposing party's employee as an undercover agent, Judge Edwards agreed with the majority. Judge Edwards said "the employment of a railroad employee to investigate accident claims against his own employer opens a tempting door to industrial spying which no person of ordinary conscience should be asked to go by every normal work day." 370 F.2d at 462 (A. 84a). The dissent came instead on the ground that a lawyer charged with misconduct:

> "should have advance notice that the act he was charged with was an offense, and prior to his hearing he should have written notice of the charge made against him. Respondent here had neither." 370 F.2d at 462 (A. 84a).

Petitioner Ruffalo here argues only the first of these two points, that he did not have advance notice that what he did was wrong; he does not support the second point: He does not complain of want of "written notice of the charge" or assert that he was not given time and full opportunity to answer it.

SUMMARY OF ARGUMENT.

I. The disbarment should be upheld upon the rule that a lawyer disbarred by the highest court of his state, will ordinarily not be allowed in Federal Court. Although the state judgment is not binding on federal courts, it will, in absence of "grave reason," be there deemed decisive, for it would be "unseemly" that a lawyer adjudged unfit to appear in the courts of his own state be admitted to plead in the federal courts. The Court of Appeals found no impropriety in the state proceedings; in addition, exercising its own independent judgment on undisputed facts, it concluded that the order of disbarment should issue.

II. Petitioner Ruffalo's claim that he was not warned that what he did was wrong is without merit. He had before him seven centuries of discipline of the profession, beginning, in the words of Judge Cardozo, "in its home across the seas," and of enforcement by the courts of the high standard, purging from their rolls the lawyer whose conduct is "unbecoming his profession." This standard, reflected in the Rules of this Court, was made clear to Ruffalo in the oath of office he took, in the Canons, and in the decisions of courts. By his conduct in hiring an employee as an undercover agent to develop evidence in suits against his employer, Ruffalo demonstrated, as the Court of Appeals held, and as the Supreme Court of Ohio had held, his want of "the fair character and integrity which must be a mark of a lawyer."

III. Constitutional claims with respect to records asserted by Petitioner Ruffalo are inapplicable. He was not disbarred because of records; he was disbarred for want of "fair character," demonstrated by his employment of a workman as undercover agent to develop evidence against his employer. The testimony about records entered

into the proceedings before the Supreme Court of Ohio only in that what Petitioner Ruffalo said on the subject (1) confirmed his awareness of the impropriety of his conduct, and (2) bore on his frankness and honesty.

IV. Issue of maintaining clients is not properly here. Petitioner Ruffalo was not disbarred on this ground; the Court of Appeals did not pass on it. If it is desirable to pass on this question, or on the other charges (which the Court of Appeals reserved) the matter should be remanded to the Court of Appeals. It is unlikely the Court of Appeals would approve a lawyer maintaining clients while their cases wait trial, and it should not.

ARGUMENT.

The judgment of the Sixth Circuit should be affirmed:

I. THE DISBARMENT SHOULD BE UPHELD ON THE RULE THAT A LAWYER DISBARRED BY THE HIGHEST COURT OF HIS STATE WILL ORDINARILY NOT BE ALLOWED IN FEDERAL COURT.

The state court's suspension, of course, is not binding on the federal court:

> *Theard v. United States* (1957), 354 U.S. 278, 282; *Selling v. Radford* (1917), 243 U.S. 46, 51.

However, as *Theard*, 354 U.S. at 282, makes clear, the state judgment "brings title deeds of high respect," and will not be overborne except for "some 'grave reason'," for it would be "unseemly," as *Selling*, 243 U.S. at 48 and 50, points out, that a lawyer adjudged unfit to appear in his state court be allowed in federal court. *In re Disbarment of Crow* (1959), 359 U.S. 1007. In dealing with disbarment, *Ex parte Burr* (1824), 6 U.S. (9

Wheaton) 529, says a reviewing court will interfere (p. 530) "only in a plain case." Mr. Chief Justice Marshall observed (p. 530):

> "the court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper."

The court will look first, as did the court below, pursuant to the command of *Theard*, 354 U.S. at 282, to the points "authoritatively expounded in *Selling*" to determine whether recognition is to be accorded to the state judgment. For this, *Selling* poses three tests (243 U.S. at 51):

1. Whether "the state procedure from want of notice or opportunity to be heard was wanting in due process"—a point that here does not arise because adequate opportunity to meet the charge was given and Petitioner Ruffalo does not contend otherwise.
2. Whether there was "an infirmity of proof as to facts found"—a point that does not here arise because Petitioner Ruffalo (Brief, p. 7) "does not question the findings of fact as to his conduct * * *"
3. Whether "some other grave reason existed" to make it improper to accept the state's judgment.

If the state proceedings meet these tests, and no "grave reason" exists for refusing to give effect to the state judgment, that is, and surely ought to be, the end of the matter.

Here the tests laid down in *Selling*, and re-affirmed in *Theard*, are satisfied.

II. PETITIONER RUFFALO'S CLAIM THAT HE WAS NOT WARNED THAT WHAT HE DID WAS WRONG IS WITHOUT MERIT.

Petitioner Ruffalo does not complain that he was in any respect denied procedural due process. He could not very well so claim. *Randall v. Brigham* (1868), 74 U.S. (7 Wall.) 523, 540. He was given, and availed himself of, opportunity to meet every charge laid against him. He was given a full and fair hearing, first by his brothers at the Bar, then by the Supreme Court of Ohio, and, finally, by the Court of Appeals for the Sixth Circuit.

What Petitioner Ruffalo does say is that no Canon, no case, no statute, no rule, warned him that it is improper to hire a workman, without his employer's knowledge, to act as an undercover agent to develop evidence against his employer. Therefore, Petitioner Ruffalo says, to disbar him for such conduct is the equivalent of convicting him for violation of a vague and uncertain statute, and is, therefore, a denial of constitutional right. A similar argument in *Bell v. Board of Regents of University of State of New York* (1946), 295 N.Y. 101, 65 N.E.2d 184, made by a dentist who said he did not know, because he had not been warned by Regulations or otherwise, that it was "unprofessional conduct" to enter into partnership with a layman, was answered by the New York court with the comment:

> "We must assume * * * he had entered upon a profession." 65 N.E.2d at 189.

As much may be expected of a lawyer.

However, Petitioner *was* warned—as next will be pointed out:

1. Petitioner Was Warned by Law of Seven Centuries That What He Did Was Wrong.

The earliest known standard regulating the legal profession, Henry S. Drinker reports in *Legal Ethics,* Columbia University Press, 1953, page 14, is to be found in the year 1275, in the Statute of Westminster, First, 3 Edward I, Chapter 29. This statute, recorded in "The Statutes at Large, From Magna Charta to the End of the Eleventh Parliament of Great Britain, *Anno* 1761," by Danby Pickering, of Gray's-Inn, Esq.; Reader of the Law Lecture to that Honourable Society, published in London, 1762, by Joseph Bentham, Printer to Cambridge University, says:

> "if any serjeant, pleader, or other, do *any manner of deceit* or collusion in the King's court, or consent unto it, in deceit of the court, or *to beguile* the court, *or the party,* and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; * * * and if the trespass require greater punishment, it shall be at the King's pleasure." [2]

Drinker points out that, in England, disbarment of Barristers was by the Benchers of the Inn, and was for (p. 33):

> "guilt of 'misconduct *unbecoming his profession.*' "

This standard applies also to Solicitors, and is enforced by the Disciplinary Committee of the Law Society. 36 *Halsbury's Laws of England,* 3rd ed., Solicitors, §§ 306, 308, pp. 221-222. Apart from the statutory grounds, Solicitors are subject to disbarment for:

> "conduct *unbefitting a solicitor.*"

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[2] Emphasis supplied throughout.

This is the same standard this Court to this day enforces. This Court's Rule 8 lays down the standard for which this Court will disbar as:

> "conduct unbecoming a member of the bar of this court * * *."

The standard applied, and upheld, by the Court of Appeals for the Sixth Circuit is the same. Its Rule 6(3) provides disbarment for:

> "conduct unbecoming a member of the bar of the court * * *."

Petitioner Ruffalo, however, says that the standard in Ohio is different, and that the Ohio Supreme Court's Rule XVIII(5)(a) defines misconduct as "any violation of the Canons" and that, therefore, unless a Canon forbidding the hiring of an employee as an undercover agent to develop cases against his employer can be found, he cannot be disciplined.

Petitioner is mistaken.

To begin with, the Ohio judgment is no longer open to review. It became final when this Court refused to review it. 379 U.S. 931. The disbarment here in question is the disbarment by the Court of Appeals for the Sixth Circuit.

Moreover, Petitioner Ruffalo's view of the Ohio standard is a mistaken one. The Ohio Supreme Court's Rule XVIII (5) (a) says:

> "Misconduct shall mean any violation of any provision *of the oath of office* taken upon admission to practice of law in this State, *or any violation of the Canons* of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice

of law, or the commission or conviction of a crime involving moral turpitude."

Observe *first* that it is misconduct to violate the oath the lawyer takes upon his admission to the bar. That oath, prescribed by Ohio Supreme Court Rule XVII, Section 7(A), includes this:

> "I will employ for the purpose of maintaining the causes confided to me *such means only* as are consistent with truth and honor * * *."

Next, observe that the Canons do not purport to cover every offense in detail. The Canons warn, in the Preamble, that:

> "No code or set of rules can be framed, which will particularize all the duties of the lawyer"

and that:

> "the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned."

Additionally, Canon 15 points out that:

> "Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do *whatever may enable him to succeed* in winning his client's cause"

and that:

> "The office of attorney does not permit, much less does it demand of him for any client, violation of law or *any manner* of fraud or chicane."

Canon 29 adds that the lawyer:

"should strive at all times to *uphold the honor* and to maintain the dignity of the profession * * *."

Canon 41 says:

> "When a lawyer discovers that some fraud *or deception* has been practiced, which *has unjustly imposed upon* the court or *a party*, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."

The business in which Petitioner Ruffalo engaged in hiring as an undercover agent an employee of the party he was suing, to develop evidence against that party, will not square with these standards, and the fact that no Canon says, in so many words, that it is misconduct to so hire an employee of the opposing party, cannot excuse what Petitioner Ruffalo did.

The Court of Appeals was surely right when, in judgment on Ruffalo's excuse that "no Canon of Ethics had ever been promulgated forbidding the practice," it said:

> "We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge, and then fashion and announce a Canon of Ethics to fit each act of misconduct." 370 F.2d at 454 (A. 65a).

This Court expressed the same view in *Ex parte Secombe* (1856), 60 U.S. (19 How.) 9. The expression there, to be sure, was *dictum*, for the Court held that removal of counsel from the rolls of the Supreme Court of Minnesota could not be reviewed here upon a writ of mandamus. However, it may be noted that the lawyer there asserted, much as here, that the Minnesota statutes (p. 14)

"enumerated the offenses for which he may be removed," and, since "he is not found guilty *of any specific offense*," his disbarment is a denial (p. 10) "of due process of law." He had been held by the Minnesota court to be (p. 11) "guilty of a wilful violation" of Chapter 93, Section 7, Subdivision 2, of the Minnesota statutes. That statute made it the duty of every lawyer (p. 14):

> "to maintain the respect due to the courts of justice and judicial officers"

but did not specify (p. 14) "the acts which shall be deemed disrespectful to the court or the judicial officers." As Mr. Chief Justice Taney observed (p. 14):

> "the statute has done but little, if anything, more than enact the general rules upon which the courts of common law have always acted * * *."

The Court saw no impropriety in this. Indeed, said the Chief Justice (p. 14):

> "it is difficult, if not impossible, to enumerate and define, with legal precision, every offence for which an attorney or counsellor ought to be removed."

These standards, which Petitioner Ruffalo says are vague and uncertain, and gave him no warning, are the standards the courts enforce. Observe that—

—(a) Petitioner Was Warned by Decisions That Courts Enforce Such Standards.

If further warning were needed, it was to be found in, for example, the following important landmarks:

> *In re McBride* (1956), 164 Ohio St. 419, 132 N.E.2d 113, certiorari denied (1956), 351 U. S. 965;
>
> *Mahoning County Bar Association v. Franko* (1958), 168 Ohio St. 17, 151 N.E.2d 17, certiorari denied (1958), 358 U. S. 932;

In re Rouss (1917), 221 N.Y. 81, 116 N.E. 782, certiorari denied (1917), 246 U. S. 661;
People, ex rel. Karlin v. Culkin (1928), 248 N.Y. 465, 162 N.E. 487.

In re McBride (1956), 164 Ohio St. 419, 132 N.E.2d 113, although dealing principally with the problem of solicitation, was not limited to that question. The decision made clear that (p. 424) "the statutory grounds for the suspension or disbarment of an attorney are *not* exclusive," and laid down the rule that (Syllabus 5):

> "The conduct of an attorney in the pursuit of his profession which may subject him to disbarment, suspension or other disciplinary measures is that which brings discredit upon himself, his profession and the courts and which violates his oath of office and the recognized and accepted code or rules governing his profession."

Judge Zimmerman went on to say:

> "The legal profession is a high and dignified calling, and those who enter it should recognize that fact and govern themselves accordingly. Upon being admitted to the practice of law they take a solemn oath which binds them to superior standards of conduct. Integrity, honesty and dignity are three attributes which clients, courts and the public have a right to expect and demand from those who follow the profession of law." (164 Ohio St. at 425-426.)

The court again, in *Mahoning County Bar Association v. Franko* (1958), 168 Ohio St. 17, 151 N.E.2d 17, in holding that a judge who becomes a candidate for non-judicial office must resign his judicial post, emphasized in the opinion by Judge Matthias, that:

> "persons admitted to the practice of law in this state must maintain a high degree of integrity and an ex-

ceptionally high standard of conduct." (168 Ohio St. at 22-23.)

This is in accordance with standards prevailing generally everywhere. *In re Rouss* (1917), 221 N.Y. 81, 116 N.E. 782, for example, ordered disbarred a lawyer for spiriting a witness out of the jurisdiction although no Canon expressly says that a lawyer will be disbarred if he enters into an arrangement for a money consideration with a witness (116 N.E. at 783) to "keep without the state." Judge Cardozo observed:

> "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. * * * Whenever the condition is broken the privilege is lost." 116 N.E. at 783.

—(b) Decisions Show That Standards Need Not Cover Every Violation in Detail.

The argument Petitioner Ruffalo makes, that he should have been told in advance by a specific Canon covering the point in detail—and, failing that, the courts must forego disbarment—has been made before. And it has been rejected:

> *Reyburn v. Minnesota State Board of Optometry* (1956), 247 Minn. 520, 78 N.W.2d 351;
> *Bell v. Board of Regents of University of State of New York* (1946), 295 N.Y. 101, 65 N.E.2d 184.

Reyburn, 247 Minn. 520, 78 N.W.2d 351, although it dealt with a different professional group, optometrists, illustrates the point. The State Board issued an order upon Reyburn and others to show cause why their licenses should not be revoked or suspended for "unprofessional

conduct." They challenged the proceedings on the ground (78 N.W.2d at 355) that the statute in authorizing revocation or suspension for "unprofessional conduct," fails "to provide sufficient administrative standards * * *." The court rejected this argument. The court said:

> " 'Unprofessional conduct' is conduct which violates those standards of professional behavior which through professional experience have become established, by the consensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest." 78 N.W.2d at 355.

The court, rejecting the kind of argument Petitioner Ruffalo here makes, ruled that:

> "The legislature need not enumerate what specific acts or omissions constitute unprofessional conduct since the phrase 'unprofessional conduct' itself provides a guide * * *." 78 N.W.2d at 355.

Bell, 295 N.Y. 101, 65 N.E.2d 184, makes the same point. There the license of a dentist was suspended "for unprofessional conduct." 65 N.E.2d at 185. The accused complained that the Board had never adopted any regulation defining "unprofessional conduct," and argued, as does Petitioner Ruffalo, that:

> "unless the Board of Regents prescribes by regulation the acts which shall constitute unprofessional conduct, no dentist may be disciplined * * *." 65 N.E.2d at 186.

The court thus had before it "a straight charge of unprofessional conduct, without any 'regulation' or 'rule' adopted by the Board * * *." 65 N.E.2d at 186. The court said:

> "It has never been necessary for the Legislature or the Board of Regents to define with particularity acts

which would constitute unprofessional conduct * * *." 65 N.E.2d at 187.

Numerous decisions demonstrate that disbarment and other penalties are enforced by the courts even though no Canon expressly, or in detail, has branded as misconduct the acts complained of, or warned the lawyer of coming discipline for such conduct. The following will illustrate the point:

Kingsland v. Dorsey (1949), 338 U.S. 318, held a lawyer properly disbarred from the Patent Office because he submitted in support of a patent a ghostwritten article without naming the ghost.

People, ex rel. Chicago Bar Ass'n v. Mall (1933), 354 Ill. 323, 188 N.E. 449, censured a lawyer, who had changed his name from Mall to Haas, because of "his loose and indiscriminate use of the names of Mall *and* Haas after he had caused his name to be legally changed. A strict observance of professional ethics compels us to condemn that use and censure him for not taking more definite means to identify himself before the profession and the public generally under his legally adopted name of Haas." 188 N.E. at 451.

Tennessee Bar Association v. Freemon (1961), 50 Tenn. App. 567, 362 S.W.2d 828, brought disbarment to a lawyer who, retained by the husband to bring a divorce suit, hired an investigator, and with him trailed the wife to a motor court and there, breaking in, took pictures of her without her consent. He "was over zealous and guilty of gross professional impropriety * * *." Said the court, "No lawyer should lower the dignity of his profession by such unseemly conduct." 362 S.W.2d at 833. Similar conduct brought sus-

pension to a lawyer in *State v. Woodville* (1926), 161 La. 125, 108 So. 309. In the court's view, there "ought to be no doubt" that such conduct is "unprofessional" and "calculated to bring the profession into disrepute * * *." 108 So. at 311. The court said it would not "give judicial approval to the conduct of an attorney who takes upon himself the responsibility of making up a case in behalf of his client and procuring the evidence by acting in the capacity of a detective or spy, as was done in this case." 108 So. at 312.

State ex rel. Oklahoma Bar Association v. Ablah (1959, Okla.), 348 P. 2d 172, brought suspension to a lawyer who, over a period of about two months, made 5 to 65 anonymous telephone calls daily to a doctor's office for "the satisfaction of revenge" because, he said, the doctor had said the lawyer "should become a grocer" and the doctor's sister had said he was "odd." 348 P.2d at 175.

In re Howell (1952), 10 N. J. 139, 89 A. 2d 652, brought suspension to a lawyer who, upon reading an editorial hinting the responsibility of the "Good Government Group" for the heart attack of a newly elected councilman, and calling the lawyer the "string-puller from Hopewell," horsewhipped the editor.

In re Blatt (1964), 42 N. J. 522, 201 A. 2d 715, censured a lawyer who brought a divorce suit for the wife and later appeared in the same action for the husband. The court found no Canon violated, but observed: "This Court's disciplinary power is not confined to the area covered by the canons." 201 A. 2d at 716.

In re Aydelotte (1923), 200 N. Y. S. 637, brought suspension to a lawyer because, in the effort to collect his fee bill, he wrote his client that if "forced to take any proceedings," he would "very much dislike" to disclose her "failure to pay income tax for years past * * *." 200 N. Y. S. at 637.

Hartford County Grievance Committee v. Cole (1960), 22 Conn. Sup. 86, 161 A. 2d 590, brought censure to a firm for sending 9,250 Christmas cards, extending the "Season's Greetings" and bearing the firm name, the legend "Attorneys at Law," and the names of the two partners and their six associates. The Court deemed this "conduct clearly unbecoming" to the profession. 161 A.2d at 594.

In re Copland (1940), 66 Ohio App. 304, 33 N.E.2d 857, appeal dismissed (1941), 137 Ohio St. 637, 32 N.E.2d 23, brought disbarment to a lawyer for "unprofessional conduct" because, as a judge, he wrote and published an opinion purporting to describe a case pending before him, which, however, was wholly fictitious. His defense was that the question was an interesting one, and "it was his purpose to edify the Bench and Bar by his thesis published under the guise of an authentic court finding." 33 N.E.2d at 858.

In re Brown (1945), 389 Ill. 516, 59 N.E.2d 855, brought suspension to a lawyer because he had reason to suspect his partner, with the connivance of a client, was submitting bills for legal services never performed, and then refunding the money to the client "to be used by it as a secret slush fund in the bribing of public officials * * *."

59 N.E.2d at 856. The lawyer did not himself participate in his partner's acts and received none of the money. However, "he at least suspected that Dryer's activities in behalf of the power company were not confined to the legitimate practice of the law." 59 N.E.2d at 857. A like case is *In re Alschuler* (1945), 388 Ill. 492, 58 N.E.2d 563. A lawyer, "kicking back" in cash, half of his annual $38,000 retainer to his client for similar purposes, was suspended for three years. "*Any* conduct of an attorney which necessarily tends to bring discredit upon the profession is an abuse of the privilege secured to him by his license." 58 N. E. 2d at 567.

In re Disbarment Proceedings (1936), 321 Pa. 81, 184 Atl. 59, and *In re Davis* (1937), 299 N.Y.S. 632, brought disbarment to lawyers who undertook to serve "Numbers Racket" organizers as lawyers for their underlings when, as was expected, they would from time to time be arrested.

In re Maley (1936), 363 Ill. 149, 1 N.E.2d 495, brought suspension to a lawyer for "conduct that is not creditable to him" for appearing in court drunk.

Fellner v. Bar Association of Baltimore City (1957), 213 Md. 243, 131 A.2d 729, brought disbarment to a lawyer for feeding slugs to parking meters.

In the foregoing examples no Canon expressly warned the lawyer that ghostwriting (a custom, Mr. Justice Jackson, dissenting, 338 U.S. at 324, remarked, "the court below cruelly pointed out flourishes even in official circles in Washington") constituted unprofessional conduct; or that it was wrong to be careless about a name; or that it was improper for the lawyer to go out with his investigator to

take pictures of a divorce suit defendant; or that anonymous telephone calls to cure a slight would bring suspension; or that horsewhipping the editor would bring discipline; or that appearing first for one party and later for the other would be deemed unprofessional; or that hint to a slow-paying client concerning income tax troubles would bring suspension; or that sending Christmas cards would be deemed advertising; or that the writing of an opinion in a case that did not actually exist, would bring disbarment; or that having reason to suspect a partner's shenanigans would bring discipline; or that one does not by prior retainer properly become house counsel for criminals; or that drunkenness may bring not merely a contempt judgment but suspension; or that it is unbecoming of a lawyer to feed slugs into a parking meter.

In light of all these warnings, plain to be read in the books, Ruffalo's argument of vagueness, uncertainty and want of warning, recalls *Northern v. State* (1947), 150 Tex. Crim. Rep. 511, 203 S.W.2d 206, where such argument *did* carry the day. In a decision, probably unmatched anywhere, the court held bad, for vagueness and uncertainty, 203 S.W.2d at 206, an indictment charging that one Buster Northern did, at a time and place named, "with his malice aforethought, kill Fannie McHenry by then and there *kicking" her to death.*

The court held the indictment bad, reversed the conviction, and dismissed the prosecution. The trouble was that the indictment did not say *what he kicked her with.*

Be that as it may, specific warning that it is improper to hire the opposing party's employee to work as an undercover agent to develop evidence against it, was available to Ruffalo. It was to be found in the books, for—

2. Law Long Ago Made Clear It Is Wrong to Hire One to Work Against His Employer.

The employee owes an obligation of loyalty to his employer. *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers* (1953), 346 U.S. 464. Employees of a radio and television station, engaged in a labor dispute, put out handbills attacking (p. 468) "the quality of the company's television broadcasts." This Court condemned such conduct, and, in an opinion by Mr. Justice Burton, said (p. 472):

> "There is no more elemental cause for discharge of an employee than disloyalty to his employer."

This is well-settled law. The *Restatement, Agency* 2d, Section 394, declares the rule to be:

> "Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed,"

to which *Comment a* adds (p. 219):

> "This is true although the agent does not agree to give his full time to the principal's business and does not use the time paid for by the principal in acting for another."

Nor will it do to argue, as does Petitioner Ruffalo, that Orlando was only a servant, for the same rules as govern the obligations of agents also "apply to servants." *Restatement, Agency* 2d, Section 429.

Judge Edwards, in the Court of Appeals, in his dissenting opinion, inspected Petitioner Ruffalo's argument that "Orlando's work involved no supervisory responsibilities to his employer and no access to records, confidential or otherwise, which would have assisted him in his daytime job with respondent." 370 F.2d at 462 (A.

83a). The answer Judge Edwards gave to this argument was this:

> "I cannot avoid concluding that Orlando's access to the B. & O.'s property and personnel would be of potential value to respondent and that it would some times be impossible (probably even for Orlando) to know when Orlando was working for the railroad and when he was investigating for respondent." 370 F.2d at 462 (A. 83a).

By any standard, Orlando owed a duty of loyalty to his employer, and, when Petitioner Ruffalo tampered with that relationship, the law told him he committed a wrong. *United States v. Procter & Gamble Co.* (D.C. Mass., 1942), 47 F.Supp. 676. That case involved, to be sure, an asserted theft of the employer's secrets. However, the point there made by Judge Sweeney is equally valid here:

> "When one tampers with that relationship [of employer and employee] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests." 47 F.Supp. at 678.

Ruffalo asserts (p. 20), that if there was a wrong, it was Orlando's. The seducer is equally guilty with his victim. This surely is the most ancient of principles. *National Labor Relations Board v. Clearwater Finishing Co.* (4 C.A., 1953), 203 F.2d 938, 939.

Moreover, Ruffalo is mistaken in arguing that (p. 19):

> "The National Railroad Adjustment Board has expressly approved the practice * * *."

The decision Ruffalo cites, *National Railroad Adjustment Board, Award No. 3624*, 21 N.R.A.B. 63, First Divi-

sion (1939), does not justify employment by a lawyer of a railroad worker to investigate cases against his employer. All that the Board approved was the "legal right of *an employe witnessing an accident* to communicate truthfully to the injured fellow employe or his representative, such facts as he may have witnessed * * *." An employee's action in doing so, the Board ruled, "cannot be regarded as disloyalty"—thus recognizing that the employee does owe a duty of loyalty to his employer. Indeed, the spirit of the Adjustment Board's decision Ruffalo relies upon condemns his conduct. In the case before the Board, the employee:

> "took this outsider to the scene of the accident to take photographs, which the outsider used in an effort to solicit employment by decedent's family."

The Board concluded:

> "Such conduct has no shadow of legal right, and the carrier was entirely within its rights in discharging petitioner."

In light of this decision, it is unlikely that the Board would approve the hiring by a lawyer of a railroad employee, as an undercover agent, to develop evidence for use in suits against his employer.

To the same effect are:

Atchison, T. & S. F. Ry. Co. v. Andrews (1949), 338 Ill. App. 552, 88 N.E.2d 364, 371;

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Atlantic Coast Line Railroad Company (E.D. N.C., 1957), 154 F.Supp. 71, 75, affirmed (4 C.A., 1958), 253 F.2d 753, 758;

National Labor Relations Board v. Clearwater Finishing Co. (4 C.A., 1953), 203 F.2d 938, 939.

The arrangement Ruffalo defends, the court, in *Atchison*, 338 Ill. App. 552, 88 N.E.2d 364, branded "a new low." There, the Atchison, Topeka & Santa Fe, and the Southern Pacific brought suit to enjoin a Chicago lawyer from prosecuting 40 actions against the Santa Fe, and 34 actions against the Southern Pacific, filed in Chicago by persons residing in California, Arizona and New Mexico. The court enjoined the lawyer from prosecuting those actions, largely on the ground they were obtained by "chasers" working for the lawyer. Observe, however, that the arrangement, as here, involved employment by a lawyer of a railroad employee to investigate a case against his employer. The person hired by the lawyer:

> "was at that time Yardmaster for the Santa Fe Railroad Company and Andrews [the lawyer] employed him to investigate a personal injury case [against Santa Fe]." 88 N.E.2d at 367.

The court regarded it:

> "a new low level when members of the instant conspiracy induced, by promises of reward, certain Santa Fe employees to secretly enter into the conspiracy against their employer." 88 N.E.2d at 371.

The enlistment of "employees of plaintiffs [the railroads] to serve him [the lawyer] to the injury of their employers" the court called "unconscionable." 88 N.E.2d at 371.

Brotherhood, 154 F.Supp. 71, expresses the same view. The National Railroad Adjustment Board ordered the railroad to reinstate an employee with back pay. The railroad refused. The court upheld the railroad. The employee, an office clerk, was fired because, after hours, he entered a company building (p. 73) with a "professional photographer, and another gentleman" to take photographs of

a spiral stairway located in the building. It appeared that (p. 73):

> "An employee of the Company was involved in a damage suit with the Company, and the pictures taken of the circular staircase might be used as evidence in the case."

The union objected that the employee could not be disciplined for this because *nothing in the labor agreement prohibited* conduct of this kind, *or warned him* that he would be disciplined for it.

The court refused to enforce the Board's order of reinstatement because the conduct of the employee (p. 75):

> "was overt action directed against the known interests of the Company * * *."

Judge Gilliam put it this way (p. 75):

> "What could he have done that would have been more detrimental to his employer than assisting the employer's adversary in litigation that was in progress by obtaining evidence in a clandestine manner in his capacity as an employee?"

The court added (p. 75):

> "Phillips [the employee] was in no way engaged in any protected union activity, but was helping a plaintiff press a personal injury claim."

The Court of Appeals, 253 F.2d 753, affirmed. The court, Judges Parker, Sobeloff and Haynsworth, concluded that the district judge had correctly held that the employee's (p. 758):

> "discharge was not arbitrary or unreasonable on the part of the railroad in view of the attitude of disloyalty which he had manifested * * *."

National Labor Relations Board v. Clearwater Finishing Co. (4 C.A., 1953), 203 F.2d 938, illustrates the same rule. It appeared that (p. 939):

> "Hutto, an employee in respondent's shop, prevailed upon Livingston, an employee in its office, to furnish him information from the files in the office which he desired to use against respondent in the hearing of the [unfair labor practice] charge which was then pending against it."

The employer fired both Hutto and Livingston.

The National Labor Relations Board held Livingston was properly discharged, but not Hutto, and the employer was ordered to take him back. The Court of Appeals refused to enforce the order. The court agreed there was good ground for discharging Livingston, for he was the one who stole the information. But, said the court, Judges Parker, Soper and Dobie (p. 939):

> "We think that the same was true of the conduct of Hutto who *induced* Livingston to furnish it."

The Court went on to say, as to Hutto's conduct (p. 939):

> "The fact that he intended to use the information in a labor hearing did not justify what he did nor preclude respondent from discharging him for conduct which any employer would have resented whether connected with union activity or not."

One more example: A lawyer's obligation cannot be less than is demanded of a co-adventurer in a real estate transaction, illustrated by *Meinhard v. Salmon* (1928), 249 N.Y. 458, 164 N.E. 545. Salmon, a real estate operator, lessee of New York property for 20 years, entered into an agreement with Meinhard, a wool merchant, whereby Meinhard was to advance half the necessary funds for improvements in return for 40% of the profits for five years and 50% thereafter, Salmon to manage the property. Near the end of the 20-year term Elbridge T. Gerry, owner of the reversion and of adjacent property, approached the lessee Salmon and agreed to lease the origi-

nal property plus others to Salmon for 20 years renewable to 80, Salmon to remove the existing structures on the land and erect a new building on the whole. Salmon did not tell Meinhard about the new proposal. Meinhard learned about it afterwards. The Court held that in the original lease, Salmon and Meinhard "were co-adventurers" and Salmon "was manager as well." 164 N.E. at 546. The Court held Salmon could not seize the new opportunity for himself and must admit Meinhard to a share. All that was involved was a commercial transaction, but the co-adventurer, Judge Cardozo observed (as the lawyer here):

> "might fairly expect to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor * * *." 164 N.E. at 548.

See also the section in *Legal Ethics*, Drinker, (1953), p. 155, on "Employment of underhanded means to get evidence * * *."

Only by ignoring all that the courts have written about professional standards, and the examples in the decided cases, can Petitioner Ruffalo say he did not know, and was given no warning of, the conduct required of a lawyer.

The cases Petitioner Ruffalo relies upon to attack his disbarment show his reliance is misplaced. The decisions cited are inapplicable. This will become apparent upon noting that Ruffalo relies upon:

> *Connally v. General Construction Company* (1926), 269 U.S. 385, which held an Oklahoma statute requiring payment of the (p. 393) "current rate of wages" void for uncertainty because it required payment (p. 394) "from so much (the minimum) to so much (the maximum), including all between * * * without saying which * * *."

Lanzetta v. New Jersey (1939), 306 U.S. 451, which held void for vagueness a New Jersey statute subjecting to punishment one (p. 452) "known to to be a member of any gang * * *."

Champlin Refining Co. v. Corporation Commisson of Oklahoma (1932), 286 U.S. 210, which held "waste of petroleum," prohibited by an Oklahoma statute, too vague to be upheld because that standard (p. 242) was "not known to the common law or shown to have any meaning in the oil industry * * *."

Giaccio v. Pennsylvania (1966), 382 U.S. 399, holding invalid a Pennsylvania statute which allowed a jury upon acquitting a defendant to impose, without any standard at all, costs enforceable by commitment to jail.

Nor is there nourishment for Ruffalo in the so-called "group legal service cases," *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), 377 U.S. 1, and *National Association For the Advancement of Colored People v. Button* (1963), 371 U.S. 415, to which this Court the other day added *United Mine Workers of America, District 12 v. Illinois State Bar Association, No. 33,* (October Term, 1967), decided December 5, 1967. These decisions seek to bring legal services to those who otherwise might not have them but they surely are not to be read to mean that a lawyer in supplying such services is free to pursue methods that are underhanded and disreputable.

Nor will Ruffalo's argument (p. 21) that he merely "represented his client well" justify such methods. Canon 15 denounces the view that a lawyer may do "whatever may enable him to succeed in winning his client's cause." On this point, *In re Greathouse* (1933), 189 Minn. 51, 248

N.W. 735, although dealing with the solicitation of lawsuits, expresses views pertinent here. The court said:

> "The argument of respondent's counsel is that * * * if a lawyer is honest with his clients his conduct is necessarily ethical. With this we do not agree * * *. If he does not appreciate the sense of duty for his own sake, we must impress it upon him for the sake of others in the profession, and also for the public welfare * * *." 248 N.W. at 739.

The court added:

> "What we are concerned with is that an attorney does not indulge in such conduct as will bring upon himself, the bar, or the courts the public odium. * * * We expect any person found morally fit to be admitted to practice law to have and to exercise a keen sense of propriety * * *." 248 N.W. at 741.

The statute, 45 U.S.C. 60, Ruffalo relies upon, will be much distorted if it is read to authorize the kind of thing Ruffalo embarked upon. Ruffalo had the right to interview witnesses, and Orlando had the right to tell whatever he might know, the statute says, "as to the facts incident to the injury or death of any employee," but neither had the right to do so in disguise, or to pretend he was what he was not.

In summary—*on this point*—the history of seven centuries of discipline since the birth of the profession, the Rule itself of this Court that disbarment will follow conduct "unbecoming a member of the bar," the oath the lawyer takes, the Canons, the decisions of courts, brand it a wrong to hire a workman as an undercover agent to develop evidence and information for use in suits against his employer. When perception is blunted, and the ear dulled, to those teachings, courts rightly conclude, as did the Sixth Circuit and the Supreme Court of Ohio that "one who believes that it is proper to employ and pay

another to work against the interests of his regular employer is not qualified to be a member" of the bar. On the other hand, "He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so." 176 Ohio St. at 269 (A. 8a).

Next, note that—

III. CONSTITUTIONAL CLAIMS WITH RESPECT TO RECORDS ASSERTED BY PETITIONER RUFFALO ARE INAPPLICABLE.

No constitutional right of Petitioner Ruffalo was violated.

Ruffalo incorrectly argues that he was disciplined for failure "to make book entries," and produce them, and that this violated Fifth and Fourteenth Amendment rights.

Ruffalo was *not* disbarred for failure to make, keep, or produce records.

The Sixth Circuit disbarred Ruffalo on the ground that he demonstrated his want of that "fair character and integrity which must be a mark of a lawyer," 370 F.2d at 453 (A. 64a), when he hired a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his employer. The facts concerning that employment were freely admitted by Ruffalo and are unquestioned by him here.

The testimony before the Ohio Supreme Court Board of Commissioners on Grievances and Discipline about records entered into the case before the Supreme Court of Ohio in two respects:

1. **It confirmed Ruffalo's awareness** of the impropriety of his conduct. Ruffalo regularly kept records and paid all other investigators by check (A. 95a), but he

said (Petitioner's brief p. 28), he did not do so here because "he knew the railroad would be angered" and "we kept it that way" because "we didn't want to get him involved with the B. & O. Railroad" (A. 93a), and "we got rid of" the records "as soon as they were examined by the Internal Revenue Department" (A. 93a) because "we didn't want it to be known, in case any question came out about it, that he was a B. & O. employee" (A. 95a); "we didn't want * * * the company finding out about it * * *." (A. 101a, 120a, 123a, 124a, 127a.)

Under such circumstances a lawyer can expect a court to ask, as did the Supreme Court of Ohio, "If the respondent *did not know* that it was wrong to do this, why did he try to cover it up?" 176 Ohio St. at 268 (A. 7a), and to conclude, as did the Supreme Court of Ohio: "Ruffalo *did know,* that it is improper to do so." 176 Ohio St. at 269 (A. 8a).

But whether Petitioner Ruffalo knew or not is immaterial. "In our opinion, *one who believes that it is proper* to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar." 176 Ohio St. at 269 (A. 8a).

The facts, freely admitted, are not questioned and manifestly demand the discipline imposed.

The second point about the testimony concerning records is that:

2. **It bore on Ruffalo's frankness and honesty.** Ruffalo argues that he could not have been compelled to testify. The point is that he *did* testify. And, what he said about the records bore on his credibility. Whether Ruffalo wanted to produce the records or not, the court could properly consider *what he said about the records* in deciding to what extent he was worthy of belief. For example, at hearings in December 1962 Ruffalo testified

he had no records concerning his payments to Orlando, or showing what Orlando did until his work as an undercover investigator stopped on the very day he was suspended by the B. & O. on July 18, 1961. (A. 138a.) And, apart from his reports to the Treasury on Form 1099, he produced none. Ruffalo said he had no records *because* "as soon as they were examined by the Internal Revenue Department, why, we got rid of them * * *." (A. 93a.)

In weighing this explanation, the court was entitled to consider that Ruffalo, by law, was obligated:

1. *To file his report to the Treasury,* on Form 1099, relating to payments made to Orlando in 1961, on or before February 28, 1962. See Reg. § 1.6041-1(a)(2) and (3), and § 1.6041-6, adopted February 13, 1959, by T. D. 6364; 625 CCH § 5077.

2. *To preserve his records* "for at least four years after the due date of such tax for the return period to which the records relate, or the date such tax is paid, whichever is later," by Reg. § 31.6001-1(e)(2) promulgated by the Secretary of the Treasury pursuant to § 6001 of the Internal Revenue Code of 1954, and that, accordingly, in this case, as to 1961 payments to Orlando, Ruffalo was required to preserve his records until 1966. He should have had, when he testified in 1962, records going back to 1958. But he said he had none.

The court thus was entitled to consider whether it was probable that Ruffalo in 1962 told the truth when he said he no longer had records concerning 1961 which the law required him to maintain at least until 1966, and was justified also in observing, "*It is difficult to believe* that the 1961 federal income tax returns of either Orlando or

Ruffalo had been checked by the Internal Revenue Service before July or even September 1962." 176 Ohio St. at 269 (A. 8a).

Thus, with respect to records, Ruffalo's appeal to *Spevack v. Klein* (1967), 385 U.S. 511, *Griffin v. California* (1965), 380 U.S. 609, and *Malloy v. Hogan* (1964), 378 U.S. 1, is misplaced. Those cases deal with matters that do not arise in this case.

Finally—

IV. ISSUE OF MAINTAINING CLIENTS IS NOT PROPERLY HERE.

The Sixth Circuit did not disbar Petitioner Ruffalo for maintaining clients.

At the same time, it is inaccurate to say (Petitioner's brief, p. 8) that the Court of Appeals concluded "that one of the two charges [i.e., Charge 8, of maintaining clients] did not justify discipline," and inaccurate to say (p. 13) that "the Court of Appeals said it would not disbar on Charge 8 'standing alone' * * *." To the contrary, the Court of Appeals said (as Petitioner concedes on page 13):

> "We do not reach that question." 370 F.2d at 450 (A. 58a).

The Court of Appeals, moreover, made clear that it was not ruling on any of the other charges made by the Board of Commissioners on Grievances and Discipline, *i.e.* Charges 3, 8, 9, 10, 11, 12. The court said:

> "Our failure to discuss them should *not* be construed as indicating that we disagree with or find unreliable the other findings of the Board of Commissioners." 370 F.2d at 449, Note 2 (A. 56a).

If, therefore, there is occasion to pass on charges other than the charge concerning the undercover agent, those

charges should be remanded to the Court of Appeals. The Court of Appeals might have a different view of those charges than Petitioner Ruffalo attributes to it. This is so for two reasons:

1. Ohio law condemns the practice of maintaining clients by advancing funds, other than the lawsuit expenses allowed by Canon 42, and then only if made "in good faith" and "subject to reimbursement," as the Ohio Supreme Court's judgment in Ruffalo's case shows. It is inaccurate for Ruffalo to assert (Petitioner's Brief, p. 42) that the Ohio Supreme Court judgment against him on this ground conflicts with its earlier decisions "approving loans to poor clients * * *." In the petition for certiorari in the case at bar, Petitioner Ruffalo (p. 21) cited four Ohio cases in support of his argument that the earlier Ohio cases approved loans to clients; now Petitioner cites (p. 42) only one of the four, *Reece v. Kyle* (1892), 49 Ohio St. 475, 31 N.E. 747. None of the four cases justifies Ruffalo's claim. Observe that:

Reece v. Kyle (1892), 49 Ohio St. 475, 31 N.E. 747, treated by Ruffalo as (p. 42) "approving loans to poor clients," falls considerably short of doing so. In that case creditors of one McMillan sought to set aside an assignment McMillan had made to lawyer Reece of a judgment the lawyer had obtained for McMillan, but which remained unpaid. McMillan had thereupon (p. 476) assigned that judgment to lawyer Reece in consideration of the legal services the lawyer had performed in getting that judgment, and that he would perform in trying to collect it, Reece to keep one-half of the proceeds and pay the other half to McMillan. The contract of assignment provided (p. 476) "Reece to advance the amount *necessary*

for expenses of the case; and one-half of said expenses is to be repaid to said Reece in the event nothing is realized from said judgment." McMillan's creditors attacked the assignment on the ground (p. 475) it "was without any consideration * * *." The court upheld the assignment. The court saw nothing wrong in undertaking (p. 488) "to enforce a claim solemnly adjudicated by a court to be just and legal, by one who has an interest in the judgment because of services rendered in obtaining it." The case holds merely that a contingent fee contract is valid and that advancement of funds (p. 486) "in payment of *costs and necessary incidental expenses*" may be made, as Canon 42 allows; it is quite wrong to say the case supports advancement of living expenses to clients.

Scheinesohn v. Lemonek (1911), 84 Ohio St. 424, 95 N.E. 913, holds only that if a lawyer accepts an account for collection for 25% of the recovery, and the client, without cause, takes the matter out of the lawyer's hands before he has done any work, he is entitled to recover "the rate of compensation fixed by the contract."

Roberts v. Montgomery (1926), 115 Ohio St. 502, 154 N.E. 740, holds merely that a one-third contingent fee contract is valid, and, if the injured party himself effects a settlement "the percentage of the settlement money designated as compensation in the contract belongs to the lawyers."

Cleveland Railway Co. v. Godfrey (1928), 28 Ohio L. Rep. 466, holds only that if a defendant settles behind the lawyer's back, it must pay to the lawyer the 50% fee of his contingent contract.

These cases establish that a contingent fee contract is valid, but it is wrong to say they justify a lawyer in advancing living expenses to clients while their suits are pending.

2. The Court of Appeals probably would condemn the practice of maintaining clients. This appears from *Dombey, Tyler, Richards & Grieser v. Detroit, Toledo & Ironton Railroad Company* (6 C.A., 1965), 351 F.2d 121, where the court, in a suit by lawyers to recover fees, remanded the case to the District Court to determine whether the attorneys' agreement to advance funds to the client was champertous. The court, Judges O'Sullivan, Cecil and Smith, observed (p. 128):

> "The District Judge made no finding as to whether there was an agreement to advance money to Craig *for living expenses* pending disposition of his claim. Neither did the District Court discuss whether such an agreement would render the representation contract champertous."

The court remanded (p. 128) "for findings upon the facts relevant to this question of maintenance." Judge Talbot Smith, in his concurring opinion, agreed (p. 138) "the matter should be explored, as a matter of public policy, because of its gravity."

Observe the court's citation, 351 F.2d at 129, of *El Janny v. Cleveland Tankers, Inc.* (N.D. Ind., 1962), 209 F.Supp. 91. In *Janny* two sets of lawyers claimed fees. The plaintiff had employed lawyers under a contingent fee contract and then fired them (p. 92) "because they wouldn't loan me money," and put his case in the hands of another lawyer who agreed (p. 92) "to take the case on a 33⅓% basis and to 'take care of * * *'" the original set of lawyers. The court observed (p. 93):

"It would also appear that he got the case because he was willing to loan the plaintiff money."

The new lawyer (p. 92):

"almost immediately started advancing plaintiff money in sizable amounts. The total advances amounted to approximately $5,000.00. It was asserted that this money was needed *for living and medical expenses* and about $1,200.00 was used to finance a trip to Lebanon by plaintiff's wife and children."

A settlement of the client's lawsuit finally was reached, and the question before the court was the division of the money. The court, Judge Beamer, remarked (p. 93):

"The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the Courts and the organized bar. Several Courts have adopted rules prohibiting the practice. The Committee on Professional Ethics of the American Bar Association in 1954 issued an opinion in which it held that this practice 'would constitute a clear violation of the Canons of Professional Ethics.' "

The court refused to make a division of the fund so as to reimburse the second lawyer for his advancements, saying (p. 94):

"This Court will not lend its office to, or in any way, encourage or sanction the practice of attorneys advancing or loaning funds to clients *for living expenses* or purposes other than costs connected with the actual prosecution of a case during the pendency of personal injury litigation."

If, therefore, other charges against Petitioner Ruffalo need to be examined, it is suggested that it will be appropriate to have them first ventilated in the Court of Appeals.

CONCLUSION.

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL T. GAINES,
700 Union Commerce Building,
Cleveland, Ohio 44115,

WALTER A. PORTER,
Talbott Tower,
Dayton, Ohio 45402,

P. PAUL PUSATERI,
137 West Main Street,
Wilmington, Ohio 45177,

JOHN R. WELCH,
33 West 11 Avenue,
Columbus, Ohio 43201,
Counsel for
Ohio State Bar Association;

PAUL J. FLEMING,
1106 Union Bank,
Youngstown, Ohio 44503,

JACK C. HARRIS,
1106 Mahoning Bank Building,
Youngstown, Ohio 44503,

HENRY C. ROBINSON,
305 Legal Arts Centre,
Youngstown, Ohio 44503,
Counsel for
Mahoning County Bar
Association.

December 20, 1967.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF: JOHN RUFFALO, JR.,
Petitioner.

REPLY BRIEF OF PETITIONER
On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

CRAIG SPANGENBERG,
1500 National City Bank Bldg.,
Cleveland, Ohio,
Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF: JOHN RUFFALO, JR.,
Petitioner.

REPLY BRIEF OF PETITIONER
On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

The Reply brief on behalf of Petitioner Ruffalo will answer the arguments of the Amicus Curiae Bar Associations in the order in which the arguments appear in their brief.

APPLICABLE RULE.

The Amicus Curiae brief states the present, amended rule of the Court of Appeals, but this is not the rule under which Petitioner Ruffalo was cited. At the time of the order to show cause in this case Rule 6 (3) of the Court of Appeals for the Sixth Circuit provided:

> "Any member of the bar of this court who is disbarred or suspended in any court of record shall, because thereof, be stricken from the roll of counsel, unless within a time to be fixed by this court, and after notice mailed by the clerk to the address on the roll, he shall show that such disbarment or suspension is no longer in effect."

Petitioner argued that under *Selling* and *Theard* he was at least entitled to show cause why the state court suspension should not be followed. The Court of Appeals

did allow Ruffalo to show cause, and thereafter amended its rule to provide for a showing of cause in future cases, and also added the language, on which the Amicus Curiae seems to rely, providing for disbarment for "conduct unbecoming a member of the bar of the court." The case below was briefed, and argued, and decided on the issue whether the federal courts should accept the state court findings on charges 8 and 13 as justifying federal disbarment, without reference to whether the conduct was or was not "unbecoming a member of the bar of the court."

The general principle that a court may disbar a practitioner for unbecoming conduct has been applied fairly often where the conduct occurred in the presence of the court and consisted of flagrant contempt or gross disrespect, as in cases of repeated, offensive intoxication in court, cited by the Amicus Curiae.

Where the questioned conduct occurs outside the court's presence, then the phrase "unbecoming conduct" must be taken to mean conduct universally held to be reprehensible, such as the commission of a crime involving turpitude, violation of clear prohibition in the Canons of Ethics, or violation of the court's own published standards of professional conduct. In the instant case, the Ohio Supreme Court's rule XXVII (5) defines misconduct as commission of crime or violation of any Canon, but does *not* list "unbecoming conduct" as a ground. "Unbecoming conduct" is far too vague to justify disbarment when the conduct has never been so described in any reference or source material.

REPLY TO STATEMENT OF THE CASE.

It is said by the Amicus Curiae that Petitioner Ruffalo was suspended under Charge 13 for hiring Michael Orlando "as an undercover agent." The same term, "undercover agent," is repeated throughout the brief. This is skillful use of epithet. The connotation of "undercover agent" is that he has access to important confidential information which he steals from his employer's files to deliver to another. In the usual sense of the word Orlando was never an "agent" and never an "undercover" operative or agent. For forty hours a week he was a night shift car inspector. There was **no evidence** that he ever worked for Ruffalo during those forty work week hours. In his off-duty hours he did the usual work of an investigator. There is **no evidence** that he ever concealed his identity or concealed the fact he was working for Ruffalo when he interviewed a witness or drove one to the courthouse for trial. There was **no evidence** of any active concealment of Orlando's work or activities.

It has been conceded in all the courts below that everything Orlando did in any investigation was perfectly proper in the cases against the Pennsylvania, P. & L. E. and other railroads; and that it would have been completely ethical for Ruffalo to have a second investigator, employed by any other railroad, to investigate his B. & O. cases.

Charge 13 does not use the epithet "undercover agent." It charges that Ruffalo "paid Orlando monies for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando." The language of the Ohio Supreme Court was that "one who believes that it is proper to employ and pay another to work against the interest of his regular employer is not qualified to be a member of the Ohio Bar." (A. 8.)

The Amicus Curiae suggests that Petitioner Ruffalo does not challenge the "*correctness*" of the final judgment of the Ohio Supreme Court suspending him from practice. It would be more accurate to say he does not challenge its finality. He has consistently disputed its correctness, in the District Court, the Court of Appeals, and in this Court.

THE ADDITION OF CHARGE 13.

The Amicus Curiae says that the charge concerning the hiring of Orlando "was based chiefly on the testimony of Orlando." This is not accurate. The Petitioner Ruffalo had made a complete statement on the whole subject, in page after page of open colloquy with the Examiners, before the charge was added (A. 122a-129a). Although he was then given opportunity to answer, there was no way he could either withdraw or explain the facts he had clearly stated—to the effect that Orlando wa only an investigator of cases and not a solicitor of cases as charged.

The language of the examiner when the charge was added was: "Now, the only evidence we are depending upon is that from his own lips to you gentlemen and from Orlando. We don't have anything else to support it" (A. 133a).

REPLY TO ARGUMENT.

It is argued that the court below met the test of *Selling v. Radford* (1917), 243 U. S. 46 at 51, whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." The want of advance notice that the conduct would be considered wrongful violated substantive due process. The want of notice of the particular charge violated procedural due process. It must be assumed that this Court, in *Selling*, was quite aware of both substantive and procedural due process requirements and used the phrase "want of notice" in both senses.

The Bar Association's brief says that Petitioner Ruffalo could not claim he was denied procedural due process, citing *Randall v. Brigham,* 74 U. S. (7 Wall.) 523, 540. He was indeed denied procedural due process, and could so claim, but has not pressed the point simply because the violation of substantive due process, the major issue, is so clearly established. *Randall* held that when the misconduct did not concern matters occurring in open court then "notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." In Petitioner's hearing no notice was given to him that it would be considered a disbarment offense to let Orlando work on B. & O. cases until *after* both Orlando and Petitioner Ruffalo had testified at length on every material fact concerning the charge. The situation presented is no different from amending an indictment to conform to the testimony after the accused has taken the stand to testify. This was wrong. The fact he was given time and opportunity to "explain" is meaningless. He was given no opportunity to un-testify and expunge the earlier statements.

THE PETITIONER WAS NOT WARNED BY THE LAW OF SEVEN CENTURIES THAT HIS CONDUCT WAS WRONG.

It is a false issue to argue that any conduct unbecoming a member of the bar warrants suspension. We would concede that if conduct were so patently wrongful that it would be universally recognized as demonstrating bad character, then the court could disbar. It is Petitioner's claim here that there was no recognition in any Canon, in any statute, nor in any decided case that what he actually did in using Orlando was wrong for a lawyer trying F. E. L. A. cases.

The Amicus Curiae brief suggests a violation of Canon 15—although the Supreme Court of Ohio did not find this canon applied to the facts. Canon 15 says in part that:

> "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied."

The language would seem to encourage the best and most effective preparation that could *lawfully* be accomplished. The Canon further says, as quoted in the Amicus Curiae brief:

> "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."

The word "chicane" has not been in popular use since Queen Victoria's day, and the lawyer reading it as a guide to conduct would undoubtedly be driven to Webster's New International Dictionary where it is defined:

> "Chicane. The use of artificial subterfuge to draw attention away from the merits of a case or question."

There is no issue in this case that could properly be encompassed by the term "chicane," which means pettifoggery or quibbling. The term "fraud" is common enough and means always an "intentional perversion of the truth" which is "intended to deceive another so that he acts on it to his legal injury," in both Webster's and Black's lexicon.

There is no way to apply "fraud" to the fact that Orlando when *off-duty* took statements from witnesses and furnished transportation to court. There is no whisper of

evidence that Orlando ever suborned perjury, suppressed truth, manipulated facts, or helped prepare a false case.

The most that can be said is that neither Ruffalo nor Orlando ever took affirmative action to tell the B. & O. Railroad that one of its night-shift car inspectors had a second job, helping his follow-employees or their widows to find the facts in F. E. L. A. cases.

PETITIONER WAS NOT WARNED BY DECISIONS.

The Amicus Curiae brief argues that *In re McBride* (1956) 164 Ohio St. 419, 132 N. E. 2d 113; and *Mahoning County Bar Association v. Franko,* 168 Ohio St. 17, 151 N. E. 2d 17, should have warned Petitioner that the court would enforce vague standards as to unbecoming conduct. The reverse is true. The claim of the accused attorney in *McBride* was that the only ground for disbarment was the legislature's standard in Sec. 1707 Ohio Gen. Code, which provided disciplinary action for professional misconduct "involving moral turpitude." The Ohio Supreme Court held that it had inherent power to provide its own additional standards and had spelled out standards in its own Rules. Section 2 of its then rules prohibited solicitation and Section 3 prohibited the employment of another to solicit, both of which rules McBride had "brazenly violated." The Court further observed that in addition to the violation of prescribed standards, "such conduct is universally condemned as a gross impropriety."

In *Franko* the Ohio Supreme Court suspended a county judge for his proven violation of Canon 30 of the Canons of Judicial Ethics. These Canons had been adopted, in 1954, *before* the conduct occurred, and it had been provided in the Rules that "wilful breach thereof shall be punished by reprimand, by suspension, or by disbarment."

Both cases involved the violation of specific rules published in advance. They could hardly give notice that the court would feel free to make up new rules as it went along and apply them to past conduct. Both cases were decided before the Amended Rules went into effect on January 1, 1957. On that date the Supreme Court adopted all 47 of the Canons of Professional Ethics, and published a limitation on the definition of misconduct. The new rule defined misconduct:

> "XXVII (5) Definition of misconduct. Misconduct, as the term is used herein, shall mean any violation of any provision of any oath of office taken upon admission to the practice of law in this state, or any violation of the Canons of Professional Ethics * * * or the commission or conviction of a crime involving moral turpitude." (Petitioner's Brief, p. 4.)

Petitioner Ruffalo was suspended for "misconduct" with no evidence that he had committed any crime involving moral turpitude; that he had violated any Canon of Professional Ethics; or that he had violated whatever oath of office was administered on his admission to practice. He was denied substantive due process—fair notice that his actions would be considered "misconduct" as defined. The Amicus Curiae brief wholly fails to meet this charge.

OTHER CASES FURNISHED NO GUIDELINES.

The Amicus Curiae brief cites many cases where discipline was imposed and argues that no Canon was violated in those cases. The argument ignores the fact that the conduct involved was either criminal, or of a type universally condemned as professional misconduct.

In *Reyburn v. Minn. State Board of Optometry* (1956) 247 Minn. 520, 78 N. W. 2d 351 a license was suspended for using a "steerer" to run business in return for

kick-backs. "Unprofessional conduct" was in fact defined in the applicable Regulations as including "the employment of 'Cappers' or 'Steerers' to obtain business" and "splitting or dividing a fee."

Bell v. Board of Regents of U. of N. Y., 295 N. Y. 101, 65 N. E. 2d 184 suspended a dentist for hiring a runner to contact prospective patients, bringing them to respondent, and splitting the fee on a percentage basis. This is universally condemned in all professions.

In re Rouss, 221 N. Y. 81, 116 N. E. 782 concerned a lawyer who was guilty of a criminal conspiracy to obstruct judgment by spiriting away a witness. He took statutory immunity and testified against his co-conspirators. There was no doubt he had committed a felony, and the case held only that his immunity from prosecution did not confer immunity from disbarment.

People, ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487 held only that a lawyer who refused to testify in an ambulance chasing investigation could be jailed for contempt. It says nothing about disbarment, nor does it accord with later decisions that would have extended the protection of the Fifth Amendment to the witness.

Kingsland v. Dorsey, (1949) 338 U. S. 318 involved actual fraud in palming off a spurious document.

People, ex rel. Chicago Bar Ass'n v. Mall, 354 Ill. 323, 188 N. E. 449 involved only censure for the "loose and indiscriminate use" of two names by the same lawyer. More serious charges of deliberate deception were dismissed.

Tennessee Bar Assoc. v. Freemon, (1961) 50 Tenn. App. 567, 362 S. W. 2d 828, sustained disbarment of a lawyer who both procured adultery and then committed

criminal trespass and felonious breaking and entry to photograph the act.

In *State, ex rel. Okla. Bar Assoc. v. Ablah,* (1959) 348 P. 2d 172 an apparently psychopathic lawyer made multiple anonymous lewd and harassing telephone calls to an enemy—conduct which is clearly a felony.

In re Howell, 10 N. J. 139, 89 A. 2d 652, concerned a lawyer who flogged a defenseless citizen with a hose and a whip. He pleaded non vult contendere to the criminal charge. He was suspended for violation of Canons and for crime involving moral turpitude.

In re Aydelotte, (1923) 200 N. Y. S. 637 deals with suspension for threatening to breach confidentiality. The lawyer coerced payment of a fee bill by threatening to reveal criminal conduct of his client. This is tantamount to extortion.

Hartford County Grievance Committee v. Cole, (1960) 22 Conn. Sup. 86, 161 A. 2d 590, involved an elaborate scheme for solicitation of business which the Committee found violated Canon 27. The court merely reprimanded the attorneys.

In re Copland, 66 Ohio App. 304, 33 N. E. 2d 857 suspended a lawyer for outright undeniable fraud involving moral turpitude.

In re Brown, 389 Ill. 516, 59 N. E. 2d 855, concerned a fraudulent scheme to overcharge, pool the kickbacks into a secret fund, and use the money for bribing public officials. *In re Alschuler,* (1945) 388 Ill. 492, 58 N. E. 2d 563, had similar facts. The wrongful conduct was not merely "unbecoming." Bribery of public officials is forbidden both by statute and by Canon.

In re Disbarment Proceedings, (1936) 321 Pa. 81, 184 A. 59, concerned participation in the numbers racket,

and also in a drunk driving defense racket wherein bail procurers would run the accused to the lawyer. The court found violation of Canon 28, and systematic obstruction of justice.

In re Davis (1937), 299 N. Y. S. 632 holds that a lawyer can be disbarred for aiding and abetting the numbers racket in violation of New York Penal Law 974.

Fellner v. Bar Assoc. of Baltimore City, 213 Md. 243, 131 A. 2d 729, concerning the systematic and prolonged feeding of slugs into a parking meter, deals with criminal acts where moral turpitude is apparent. The lawyer could have been jailed as well as disbarred.

In all of these cases the facts support the Ohio definition of misconduct—either crime involving moral turpitude or violation of a Canon. The case of *In re Maley,* 363 Ill. 149, 1 N. E. 2d 495 (1939) is different. There the misconduct was in the presence of the court, when the lawyer repeatedly appeared in court when drunk, once slept through most of the hearing, on another occasion was highly discourteous and disrupted proceedings, and twice had to be led out of court. Apparently there is no Canon prohibiting drunkenness specifically, but at least there were previous Illinois cases, cited in the opinion, where drunkenness justified disbarment, so that respondent had notice by an established line of decisions.

ORLANDO'S WORK WAS NOT WRONGFUL.

It is the law in Ohio that an hourly employee may, after hours, work for another, so long as the type of work he does is not inconsistent with the duty he owes each employer. A mechanic who operates a lathe on the first shift for Ford could doubtless run a milling machine on the second shift for Chevrolet; but a designer developing a new model for Dodge should not design a new model for Pon-

tiac at the same time. It is said in 35 *Ohio Jurisprudence* 2d, 703, § 82:

> "An employee employed for a specified number of days in the week is entitled to the remainder of the time to do such other work as he chooses, providing it is not inconsistent with his duties to his employer."

Orlando's only duties to the B. & O. were to inspect air brakes properly. Nothing he did for Ruffalo was inconsistent with his job of bleeding air from incoming trains. Of course, it would have been wrong for him to steal trade secrets, as in *U. S. v. Procter & Gamble Co.*, 47 F. Supp. 676. It would have been wrong for Orlando to induce another employee to steal confidential information from the files, and participate in the use of it, as in *N. L. R. B. v. Clearwater Finishing Co.*, 203 F. 2d 938. It would have been wrong for Orlando to join with other employees to solicit cases for an out-of-state lawyer, as in *Atchison, T. & S. F. Ry. Co. v. Andrews*, 338 Ill. App. 552, 88 N. E. 2d 364. The Amicus Curiae brief misquotes this case, implying mere investigation by an employee was characterized as a "new low." Not so. The Yardmaster in that case was actively soliciting and getting other employees to solicit and run cases, for a split of the fee.

In *Brotherhood of Railway and Steamship Clerks, etc. v. Atlantic Coast Line R. Co.*, 154 F. Supp. 71, 75; aff'd 253 F. 2d 753, 758, there was far more than mere investigation. The employee was discharged because he went onto company property where he had no right to be, procured a door to be unlocked which should have barred his presence, brought in an outsider, a photographer, to trespass on company property, and then helped the trespasser get the photographs he wished. The railroad claimed the act was "an unwarranted trespass on property of the company" (154 F. Supp. at 73) and discipline of the employee was sustained.

The facts are quite similar to the case of *Brotherhood of Railroad Trainmen—Cleveland, Chi. & St. L. Ry.*, Award No. 3624, 21 N. R. A. B. 63, First Division (1939). There the Board held that the employee could be discharged when he took an outsider to the scene of the accident to take photographs, which the outsider then used to solicit legal employment, all under an arrangement with a disbarred attorney, in no way representing the decedent's estate.

The Amicus Curiae brief says that:

> "In light of this decision it is unlikely the Board would approve the hiring by a lawyer of a railroad employee, as an undercover agent, to develop evidence for use in suits against his employer."

Not so. The Board stated in this very opinion that it would *approve* of the type of work Orlando did. The exact language of the Board is:

> "On the other hand there is no doubt whatever of the right of an employee, when off duty, to assist an injured employee or his representative *in any manner including the gathering of evidence*, and so long as it is limited to the development of truth it cannot be regarded as disloyalty nor afford just grounds for discharge." (Emphasis added.)

Petitioner Ruffalo knew of this Railway Adjustment Board ruling, applicable to the very district where Orlando worked. He tried to tell the Bar Committee there was such a ruling (A. 132a, 133a). They would not believe it, and insisted Ruffalo must have known it was wrong. Ruffalo's answers demonstrate his claim of right:

> "He had a perfect right to do that, as long as he does not go on their property or take photographs on their property or anything like that. His time is his own. * * * There was nothing wrong with it. It was perfectly proper for him to be able to do those things.

> * * * On his own time, in his time off, he has a right to do whatever he wishes * * * I don't see that there was anything wrong in investigating a case which he had not in any way brought into my office or had anything to do with * * * No, I didn't interpret it as being morally wrong * * * I can see no wrong in a man doing it on his own time * * *" (A. 123a-126a).

Is it really "unbecoming a member of the bar" who specializes in railroad cases to believe that he can follow the teaching of the National Railroad Adjustment Board, when the statement of the Board has never been reversed or modified by any later Board ruling or court decision? There is nothing in the history of seven centuries of discipline of the bar that should have warned Petitioner Ruffalo he could be disbarred for having a Saturday employee interview witnesses in cases involving the Friday employer. There was no theft from files, no breach of confidence, no slanderous charges against the general employer, no unfair labor practice, no trespass, no fraud, no chicane, and no solicitation or running of business. No canon was violated. No crime was committed. There was no disrespect to any court or the staff of the court. There was no injury to the rights of any client. On the contrary, the clients were well served.

Petitioner's disbarment was arbitrary, unwarranted, and in violation of his constitutional rights. It should be reversed.

Respectfully submitted,

CRAIG SPANGENBERG,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL T. GAINES,
700 Union Commerce Building,
Cleveland, Ohio 44115,

WALTER A. PORTER,
Talbott Tower,
Dayton, Ohio 45402,

P. PAUL PUSATERI,
137 West Main Street,
Wilmington, Ohio 45177,

JOHN R. WELCH,
33 West 11th Avenue,
Columbus, Ohio 43201,

Counsel for Ohio State Bar Association.

May 6, 1968.

(*Other Counsel on inside of cover.*)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

PAUL J. FLEMING,
1106 Union Bank,
Youngstown, Ohio 44503,

HENRY C. ROBINSON,
305 Legal Arts Centre,
Youngstown, Ohio 44503,
Counsel for Mahoning County Bar Association.

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No. 73.

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PETITION FOR REHEARING.

Now come the Ohio State Bar Association and the Mahoning County Bar Association and petition for rehearing by this Court of its decision of April 8, 1968, in this cause. The Court, before permitting its decision to become final, should reexamine, and reconsider, the basis of its holding, because:

1. The Court's decision creates a contradiction likely to do irreparable harm to the cause of justice. The wrong this Court says was done to petitioner Ruffalo, this Court's judgment in turn inflicts upon others—viz.: the public, the courts, and the judicial system. The due process this Court says was denied to Ruffalo, this Court has denied to the bar associations engaged in an imperatively important, albeit distasteful, task of striving for honorable standards at the bar. This Court may or may not agree with the standard, but it cannot in conscience deny to bar associations, or the public, the same due process it accords petitioner. It is precisely such denial that has here occurred, as next will be pointed out.

Recall that this Court reversed the Sixth Circuit's judgment of disbarment because petitioner was not in-

formed, in advance of the hearing, of the charge on which he was disciplined. That charge was added on the third day of hearings that were not to close for another eight months. If in that eight months new hearings had been started, petitioner could not have complained. However, instead of starting a fresh proceeding, the charge was added by amendment—and Ruffalo was assured of whatever time he might wish for answer.

Next, observe that claim of denial or loss of any right whatever by *failure to give the advance notice* this Court's judgment demands:

1. *Was not raised* by petitioner when he made his response to the show-cause order entered by the Court of Appeals for the Sixth Circuit.
2. *Was not raised* by petitioner in his brief to the Court of Appeals.
3. *Was not raised* by petitioner in his oral argument to the Court of Appeals.
4. *Was not passed upon* by the Court of Appeals in entering the judgment of disbarment.
5. *Was not raised* by petitioner in his petition for certiorari.
6. *Was not argued* by petitioner in his brief to this Court.
7. *Was not argued by petitioner* at the bar of this Court.

The *only* suggestion that failure to give advance notice of the charge denied petitioner any right whatever, came in the dissenting opinion in the Court of Appeals. But, with the dissenting opinion before him, petitioner *refused* in this Court to support that claim as a ground for reversal.

A clearer case of waiver of the only point on which this Court has reversed is not to be imagined.

But, more important, if, under the circumstances of this record, due process requires that a lawyer be given notice (before the hearing starts) of a charge on which his peers assert he has been faithless to his public obligation (and it is not enough that he be given, as here, full opportunity to meet the charge) then, if reason is to retain its seat, due process equally requires that those who perform the unhappy public duty of seeking to maintain integrity at the bar, be accorded like due process. They, as representatives of the public, are entitled to the same notice and opportunity to defend as is petitioner. The right to due process is as important to the one as to the other. To reverse a judgment concerning professional integrity upon an issue neither raised nor passed upon below, not asserted as a ground for reversal, and not conceived of by petitioner as a denial of right, is as grave a denial of due process as that which this Court says it corrects. Evenhanded due process, that demands notice to one party, commands like notice to the other, so that both may focus on the issue that is to control and bring to the Court's attention considerations to which the Court should be alerted before it decides. If a case is not to be decided on its issues, there is no point in either framing them or giving notice of them.

The Court's denial to one party of the due process it demands for the other is understandable only on the hypothesis, which itself marks a second wrong, that—

2. The Court's decision is bottomed upon mistake of fact. Whatever is to be said of the advance notice point in the proceedings before the Supreme Court of Ohio in *Mahoning County Bar Association v. Ruffalo* (1964), 176 Ohio St. 263, 199 N.E.2d 396, certiorari denied (1964), 379 U.S. 931, petitioner indisputably *did* have *advance notice* of the charge on which he was disbarred in the

proceedings before the Court of Appeals—the only proceedings here in review. And petitioner defended in those proceedings, not on the ground that he did not have advance warning of the charge, but on the ground that it was ethically upright conduct to do what he did.

The Court should, therefore, reopen—and should stay its hand until it has the full story—because, if it is wrong to hear a charge without notice, *it is equally wrong* to reverse on a record not made. This Court should not cast loose a decision based upon mistake of fact.

It is the more important that the Court stay its hand because—

3. The Court's decision promises mischievous consequences in two directions. *First*, this Court has never held that one may acquire virtual immunity by voluntarily revealing his misdeeds. Had petitioner *refused* to testify, he could not, for that refusal, be disciplined. But he *did* testify. He met the charge of soliciting by revealing what—in the judgment of the 17 members of the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, and in the judgment of five judges of the Ohio Supreme Court, and in the judgment of all three judges of the Court of Appeals (for even the dissenting judge found "the employment of a railroad employee to investigate accident claims against his own employer opens a tempting door to industrial spying which no person of ordinary conscience should be asked to go by every normal work day," 370 F.2d at 462)—was misconduct more serious than the misconduct he was explaining. To excuse one default he revealed another.

Now, note that even in a criminal case, this Court has yet to hold that evidence the accused voluntarily supplies, without standing on his constitutional right to remain

silent, may not be shown against him. If in a civil disciplinary proceeding, such as this, a lawyer may sterilize evidence by blurting it out, it is difficult to find the ground on which a criminal defendant is to be denied the same opportunity to create immunity. Consequences to the criminal law so profound this Court will not wish to invite. And, surely, before any decision with such potential for mischief is made final, the Court will wish to reexamine the question.

Second, the decision leaves uncertain whether discipline at the bar demands a code defining, as would a criminal code, the well-nigh infinite variety of acts of misconduct for which a lawyer may be disciplined. If that is what is required, then a new six-foot shelf is surely in the making. As is known, the American Bar Association is at work on a restatement of the Canons. This Court should reflect on the consequences of the present decision upon efforts to maintain the integrity of the bar. This Court owes to the profession, to the courts, to the public, to the administration of justice, the guidance that only this Court can give.

Reexamination is needed also because—

4. The Court's decision rests on impermissible factual assumptions that surely need to be reexamined, and it sanctions inferences apt to generate problems the Court will find it difficult to live with in the adjudication of disciplinary problems this decision will spawn, not only in law, but in all the professions. Observe that:

(a) *The relationship between Ruffalo and Orlando* is not the chaste arrangement described by the Court. It had been going on for years. Ruffalo had already shown his contempt for the law by failing for "more than five years" (until the commencement of the present proceed-

ings) to pay the costs assessed against him when in 1957 "he was found 'guilty of unprofessional conduct in his office as an attorney at law * * *.'" 176 Ohio St. at 269. The lengths to which Ruffalo and Orlando went to hide the relationship—involving resort to the practice of making payments in cash only, and destruction of records—alone ought to raise question whether findings below ought to be overthrown, and whether, as this Court believed, Ruffalo "chose a railroad man to help him investigate those claims because Orlando knew railroading." (Slip Opinion, p. 4.) The moment Orlando was fired by the railroad (on the ground he was soliciting claims against the company, 176 Ohio St. at 265), Orlando's services to Ruffalo also ceased. Orlando's knowledge of "railroading" was no less *after* he was fired than it was before; his usefulness only was changed: he no longer had access to B. & O. yards and property. Until then he had been astonishingly active in his "investigating." He worked full time for the railroad; he said he worked 10 to 15 days a month for Ruffalo. He was paid $25 a day, plus expenses. Ruffalo reported to the Internal Revenue Service that he paid Orlando $14,018.62, of which $4,716.00 was paid in the six and one-half months he worked for Ruffalo in 1961 (up to the time when he was fired by the railroad and his services to Ruffalo ended). As Judge Edwards, dissenting on other grounds, put it, in answering Ruffalo's claim that Orlando had no supervisory responsibilities and no access to records:

> "I cannot avoid concluding that Orlando's access to the B. & O.'s property and personnel would be of potential value to respondent [Ruffalo] and that it would some times be impossible (probably even for Orlando) to know when Orlando was working for the railroad and when he was investigating for respondent." 370 F.2d at 462.

(b) *This Court acted in the mistaken belief* that in the Court of Appeals "The majority held that while one of the two charges might not justify discipline, the other one did * * *." (Slip Opinion, p. 1.) The Court is in error. The Court of Appeals disbarred on Charge 13; it said, "We do not reach" Charge 8. 370 F.2d at 450. The Court of Appeals reserved Charges 3, 8, 9, 10, 11 and 12. They are charges of soliciting, maintaining clients, and threatening and intimidating witnesses. They are set forth in 370 F.2d at 454-460. As to this the Court of Appeals said:

> "Our failure to discuss them should not be construed as indicating that we disagree with or find unreliable the other findings [i.e., upholding Charges 3, 8, 9, 10, 11 and 12] of the Board of Commissioners." 370 F.2d at 449, Note 2.

(c) *Apart from the fact that the "advance notice"* point, on which this Court reversed, was never raised in these proceedings, reversal on this ground generates a second problem. The authority this Court (Slip Opinion, p. 6) relied upon, *Randall v. Brigham* (1868), 7 Wall. 523, 540, as establishing in a disbarment case the need for "notice * * * and opportunity * * * for explanation and defense," does *not* require such notice to be given *in advance* of the hearing. To the contrary, *Randall* makes clear that (p. 540):

> "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings *are often instituted* [as here] *upon information developed in the progress of a cause;* or from what the court learns of the conduct of the attorney from his own observation." [1]

[1] Emphasis supplied throughout.

It cannot be doubted that Ruffalo had precisely such notice, and opportunity to explain and defend.

Observe also that it generally is the law that if (as here) an issue is tried, although not pleaded *in advance*—and is, therefore, an issue of which no advance notice was given—Rule 15(b) of the Federal Rules of Civil Procedure permits amendment *even after judgment,* and says further that "failure so to amend does *not* affect the result of the trial * * *."

(d) *Ruffalo has never claimed* that the testimony he and Orlando gave, on which Ruffalo was disbarred on Charge 13 for hiring Orlando to prepare and investigate lawsuits against his own employer, is untrue. This Court, however, has reversed because Ruffalo, having been charged on that evidence, could thereafter "be given no opportunity to expunge the earlier statements and start afresh." (Slip Opinion, p. 7.)

The Court should consider whether discipline can be maintained at the bar, or in any of the professions, if there is such right, after revealing the facts, to "start afresh."

In addition—

5. The Court's decision leaves unresolved the further proper course of these proceedings. The Court of Appeals ruled on one ground of misconduct. Six others the Court of Appeals reserved. 370 F.2d at 449. May the court, if it gives fresh notice, hear charge 13? May the court hear the other six charges? To be sure, the Court of Appeals can be left to deal with these problems as best it can, and, in case of claim of error, let the case wander back here again. However, efficiency in judicial proceedings, conservation of judicial energy, and justice to the parties all combine to urge that these matters be not left open—unresolved.

CONCLUSION.

This case raises serious and important problems.

The Court should restore the case to the calendar for reargument, reexamination and reconsideration.

Respectfully submitted,

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL T. GAINES,
700 Union Commerce Building,
Cleveland, Ohio 44115,

WALTER A. PORTER,
Talbott Tower,
Dayton, Ohio 45402,

P. PAUL PUSATERI,
137 West Main Street,
Wilmington, Ohio 45177,

JOHN R. WELCH,
33 West 11th Avenue,
Columbus, Ohio 43201,
Counsel for Ohio State Bar Association.

PAUL J. FLEMING,
1106 Union Bank,
Youngstown, Ohio 44503,

HENRY C. ROBINSON,
305 Legal Arts Centre,
Youngstown, Ohio 44503,
Counsel for Mahoning County Bar Association,

By THOMAS V. KOYKKA.

May 6, 1968.

CERTIFICATE OF COUNSEL.

Thomas V. Koykka says he is counsel for the Ohio State Bar Association and the Mahoning County Bar Association in this cause, and certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

THOMAS V. KOYKKA,
1144 Union Commerce Building,
Cleveland, Ohio 44115.

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1967.

In the Matter of John Ruffalo, Jr., Petitioner.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 8, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was ordered indefinitely suspended from the practice of law by the Supreme Court of Ohio on two findings of alleged misconduct. *Mahoning County Bar Assn.* v. *Ruffalo*, 176 Ohio St. 263, 199 N. E. 2d 396. That order became final and is not here on review. The Federal District Court, after ordering petitioner to show cause why he should not be disbarred, found that there was no misconduct. *In re Ruffalo*, 249 F. Supp. 432 (D. C. N. D. Ohio). The Court of Appeals likewise ordered petitioner to show cause why he should not be stricken from the roll of that court on the basis of Ohio's disbarment order. The majority held that while one of the two charges might not justify discipline, the other one did; and it disbarred petitioner from practice in that Court. 370 F. 2d 447 (C. A. 6th Cir.). The dissenting judge thought that neither charge justified suspension from practice.[1] *Id.*, at 460. The case is here on a writ of certiorari. 389 U. S. 815.

[1] After the Court of Appeals decision disbarring petitioner, the District Court, which had deferred final order pending the decision of the Court of Appeals, suspended petitioner from practice in the District Court. The District Court judge said he had an "abiding conviction" that his prior decision finding no grounds for suspension was correct but concluded that orderly administration of justice required the Distrist Court to defer to its Court of Appeals. The District Court's order is not before us for review.

Petitioner was an active trial lawyer who handled many Federal Employers' Liability Act cases. The Association of American Railroads investigated his handling of claims and referred charges of impropriety to the President of the Mahoning County Bar Association who was also local counsel for the Baltimore & Ohio Railroad Co. See *In re Ruffalo*, 249 F. Supp. 432, 435, n. 3. The Mahoning County Bar Association then filed the charges against petitioner.

In the state court proceedings, upon which the decision of the Court of Appeals relied (see Rule 6 (3) of the United States Court of Appeals for the Sixth Circuit), the Ohio Board of Bar Commissioners on Grievances and Discipline originally charged petitioner with 12 counts of misconduct. Charges Nos. 4 and 5 accused petitioner of *soliciting* FELA plaintiffs as clients through an agent, Michael Orlando. At the hearings which followed, both Orlando and petitioner testified that Orlando did not solicit clients for petitioner but merely *investigated* FELA cases for him. It was brought out that some of Orlando's investigations involved cases where his employer, the Baltimore and Ohio Railroad, was defendant. Immediately after hearing this testimony, the Board, on the third day of hearings, added a charge No. 13 against petitioner based on his hiring Orlando to *investigate* Orlando's own employer. Counsel for petitioner objected, stating:

> "Oh, I object to that very highly. There is nothing morally wrong and there is nothing legally wrong with it. . . . When does the end of these amendments come? I mean the last minute you are here [counsel for the county Bar Association] may bring in another amendment. I think this gentleman [petitioner] has a right to know beforehand what the charges are against him and be heard on those charges."

Motion to strike charge No. 13 was denied, but the Board gave petitioner a continuance in order to have time to respond to the new charge.

The state Board found petitioner guilty of seven counts of misconduct, including No. 13. On appeal, the Supreme Court of Ohio found the evidence sufficient to sustain only two charges, one of them being No. 13, but concluded that the two violations required disbarment. The only charge on which the Court of Appeals acted was No. 13, which reads as follows:

> "That Respondent did conspire with one Michael Orlando, and paid said Michael Orlando monies for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all of the time extending from 1957 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company."

Though admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court. Though that state action is entitled to respect, it is not conclusively binding on the federal courts. *Theard* v. *United States*, 354 U. S. 278, 281–282.

Petitioner, active in the trial of FELA cases, hired a railroad man to help investigate the cases. He was Orlando, a night-shift car inspector for the Baltimore & Ohio R. Co. There was no evidence that Orlando ever investigated a case in the yard where he worked as inspector. There was no evidence that he ever investigated on company time. Orlando had no access to confidential information; and there was no claim he ever revealed secret matters or breached any trust. It is clear from the

record that petitioner chose a railroad man to help him investigate those claims because Orlando knew railroading.

One federal guidepost in this field is contained in 45 U. S. C. § 60 which was enacted to encourage employees of common carriers to furnish information "to a person in interest," as to facts incident to the injury or death of an employee.[2]

The Ohio Supreme Court, however, concluded that "one who believes that it is proper to employ and pay another to work against the interest of his regular employer is not qualified to be a member of the Ohio Bar." 176 Ohio St., at 269, 199 N. E. 2d, at 401.

We are urged to hold that petitioner's efforts to conceal this employment relationship and the likelihood of a conflict of interest require the federal courts to respect the decision of the Ohio Supreme Court as being within the range of discretion.

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[2] 45 U. S. C. § 60 provides in part:

"Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine or not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

We do not pursue that inquiry. Nor do we stop to inquire whether the proceeding was defective because the President of the Bar Association, the agency that made the charges against petitioner, was headed by counsel for the Baltimore & Ohio R. Co. against whom petitioner filed several of his claims. For there is one other issue dispositive of the case which requires reversal.

As noted, the charge (No. 13) for which petitioner stands disbarred was not in the original charges made against him. It was only after both he and Orlando had testified that this additional charge was added. Thereafter, no additional evidence against petitioner relating to charge No. 13 was taken. Rather, counsel for the county bar association said:

> "We will stipulate that as far as we are concerned, the only facts that we will introduce in support of Specification No. 13 are the statements that Mr. Ruffalo has made here in open court and the testimony of Mike Orlando from the witness stand. Those are the only facts we have to support this Specification No. 13."

There was no *de novo* hearing before the Court of Appeals. Rather, it rested on the Ohio court's record and findings:

"We have before us, and have reviewed, the entire record developed by the Ohio proceedings, but think it proper to dispose of the matter primarily upon the charges on which the Ohio Court disciplined Mr. Ruffalo. The facts as to these are not in dispute. We consider whether we find insupportable the Ohio Court's determination that such facts disclosed unprofessional conduct warranting the discipline imposed and whether they warrant similar discipline by us." 370 F. 2d, at 449.

The Court of Appeals proceeded to analyze the "admitted facts of Charge No. 13" as found by the Ohio court and the Ohio court's ruling on those facts. *Id.*, at 450–452.

If there are any constitutional defects in what the Ohio court did concerning Charge 13, those defects are reflected in what the Court of Appeals decided. The Court of Appeals stated:

> "We do not find in the record of the state proceedings, 'Such an infirmity of proof as to the facts found to have established the want of . . . [Ruffalo's] fair private and professional character' to lead us to a conviction that we cannot, consistent with our duty, 'accept as final the conclusion' of the Supreme Court and the Ohio bar." *Id.*, at 453.

We turn then to the question whether in Ohio's procedure there was any lack of due process.

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack* v. *Klein*, 385 U. S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In re Oliver*, 333 U. S. 257, 273. It was said in *Randall* v. *Brigham*, 7 Wall. 523, 540, that when proceedings for disbarment are "not taken for matters occuring in open court, in the presence of the judges, notice should be given to the attorney of the charge made, and opportunity afforded him for explanation and defence." Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." *Selling* v. *Radford*, 243 U. S. 46, 51.

In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified

at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation." 370 F. 2d, at 462.

These are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault*, 387 U. S. 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.[4]

How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

---

[3] Rule 15 (a), Rules of Civil Procedures, provides in part:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

[4] The Ohio State Bar Association and Mahoning County Bar Association, *amici curiae* in support of the order of the Court of Appeals, argue that there was no due process violation because the State Board gave petitioner several months to respond to charge No. 13. This argument overlooks the fact that serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled "into a false sense of security" (*Bouie* v. *City of Columbia*, 378 U. S. 347, 352) that he could rebut charges Nos. 4 and 5 by proof that Orlando was his investigator rather than a solicitor of clients. In that posture he had "no reason even to suspect" (*ibid.*) that in doing so he would be, by his own testimony, irrevocably assuring his disbarment under charges not yet made.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.

Reversed.

MR. JUSTICE BLACK, for reasons stated in the Court's opinion and many others, agrees with the Court's judgment and opinion.

MR. JUSTICE STEWART took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1967.

In the Matter of John Ruffalo, Jr., Petitioner.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 8, 1968.]

Mr. Justice Harlan, concurring in the result.

I see no need to decide whether the notice given petitioner of the charge that formed the basis of his subsequent federal disbarment was adequate to afford him constitutional due process in the state proceedings. For I think that *Theard* v. *United States*, 354 U. S. 278, leaves us free to hold, as I would, that such notice should not be accepted as adequate for the purposes of disbarment from a federal court. On that basis, I concur in the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1967.

In the Matter of John Ruffalo, Jr., Petitioner.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 8, 1968.]

Mr. Justice White, with whom Mr. Justice Marshall joins, concurring in the result.

The Court reverses petitioner's disbarment by the Court of Appeals for the Sixth Circuit because petitioner had inadequate notice prior to his earlier state disbarment proceeding of the charges which the Mahoning County Bar Association was bringing against him at that proceeding. The state disbarment, however, is not before us. We denied a petition for certiorari seeking review of it. *Ruffalo* v. *Mahoning County Bar Assn.*, 379 U. S. 931 (1964). Our writ in the instant case extends only to petitioner's disbarment by the Court of Appeals for the Sixth Circuit. The question therefore is whether the defective notice in petitioner's state disbarment proceeding so infected that federal proceeding that justice requires reversal of the federal determination.

In answering that question we must inquire into the nature of the proceedings that took place in the Court of Appeals. That court was obligated to determine for itself the facts of the attorney's conduct and whether that conduct had been so grievous as to require disbarment. *Theard* v. *United States*, 354 U. S. 278 (1957). The Court of Appeals asked petitioner to "show cause if any he has . . . why he should not be stricken from the roll of counsel of this Court." In response to that order petitioner filed a response and brief. The Ohio State Bar Association filed a brief also, urging petitioner's

disbarment. The cause was argued orally to a panel of the Court of Appeals.

In his brief and oral argument, petitioner did not take issue with the determinations of fact that had been made by the Ohio Supreme Court. The Court of Appeals gave petitioner a full opportunity to assert that the state court had not accurately determined the facts of his conduct—and to assert, had he wished to do so, that the late point at which he learned that employing car inspector Orlando would be one ground for disbarment had prejudiced the factual record formed in the state court. Petitioner, not disputing the lower court's factual conclusions, made no such objection.[1] Instead petitioner's response in the Court of Appeals was that the agreed facts of his conduct were not a sufficient basis for disbarment. In reaching its conclusion on that question the Court of Appeals properly gave weight to the views of the state court judges who had passed on the issue. Petitioner, however, had full and fair opportunity to put to the Court of Appeals his contrary view. I must therefore conclude that no procedural defect supports reversal of the decision of the Court of Appeals, and that the asserted defect relied upon by the Court, since not raised by petitioner below or here, is not properly before us. I am therefore constrained to deal with the central question posed by this case, whether it was proper for the Court of Appeals, in making the independent determination of petitioner's fitness to remain a member of its bar mandated by *Theard* v. *United States, supra,* to disbar petitioner for having hired an employee of the B. & O. Railroad to investigate facts relevant to damage

[1] Indeed, petitioner did not suggest to this Court, as a reason for reversal, that he had learned of the ground for disbarment too late in the state court proceeding.

suits against the railroad brought by other employees who had retained petitioner to represent them. We must determine whether the Court of Appeals satisfied its duty "not to disbar except upon the conviction that, under the principles of right and justice, [it is] constrained so to do." *Selling* v. *Radford*, 243 U. S. 46, 51 (1917).

A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. The Court of Appeals for the Sixth Circuit had provided petitioner and the other members of its bar with a general standard for disbarment:

> "When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court." Rule 6 (3), Court of Appeals for the Sixth Circuit.[2]

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[2] The Court of Appeals did not apply its rule literally: "We should preliminarily observe that our own Rule 6 (3) . . . could be read as automatically striking from our roll of counsel the name of any lawyer disbarred in any court of record. It has been amended and we consider this matter in keeping with the requirements and admonitions of *Theard* v. *United States*, 354 U. S. 278, . . . and *Selling* v. *Radford*, 243 U. S. 46 . . . . These decisions forbid Federal Courts from acting in total reliance on a state judgment. We have before us, and have reviewed, the entire record developed by the Ohio proceedings, but think it proper to

Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as *malum in se*. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession.

The conduct for which the Court of Appeals disbarred petitioner cannot, however, be so characterized. Some responsible attorneys, like the judge who refused to order petitioner disbarred from practice in the Northern District of Ohio, 249 F. Supp. 432 (1965), would undoubtedly find no impropriety at all in hiring a railroad worker, a man with the knowledge and experience to select relevant information and appraise relevant facts, to "moonlight"—work on his own time—collecting data. On the other hand some, like the officials of the Mahoning County and Ohio State Bar Associations, would believe that encouraging a man to do work arguably at odds with his chief employer's interests is unethical. The appraisal of petitioner's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question.[3] I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that con-

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dispose of the matter primarily upon the charges on which the Ohio Court disciplined Mr. Ruffalo. The facts as to these are not in dispute." 370 F. 2d 447, 449 (1966) (note omitted).

[3] As the Court points out, there was no evidence before any of the state or federal courts which appraised petitioner's conduct that the man he employed had ever investigated a case in the yard where he worked, investigated on company time, or been given access to confidential railroad information.

duct is unethical if responsible attorneys would differ in appraising the propriety of that conduct. I express no opinion about whether the Court of Appeals, as part of a code of specific rules for the members of its bar, could proscribe the conduct for which petitioner was disbarred.